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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IMELDA CONTRERAS DE AVILA, et al.,

Petitioners,

vs.

WILLIAM FRENCH SMITH, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Department of State's withholding, from eligible Mexican visa applicants, of 13,366 preference visas authorized by Congress during fiscal year 1977 violates the Immigration and Nationality Act.

PARTIES

The petitioners are: Imelda Contreras De Avila, Velia Hurtado-Espinoza, Raul Camarena-Salinas, Narsizo Romero-Bahena, Juan Ayala-Bucio, Josefina Ibarra De Ayala, Fidel Ocampo-Ocampo, Candelario Escobar De Ocampo, individually and on behalf of all others similarly situated, and Filemon Avila, Francisca Camarena, Clemente Hurtado, Agripina Romero, Norma Veronica Ayala, Ruby Ocampo, Fidel Ocampo, Jr., individually and on behalf of all others similarly situated.

The respondents are: William French Smith, as Attorney General of the United States; United States Department of Justice; Alexander Haig, as Secretary of the United States Department of State; United States Department of State; Doris Meisner, as Commissioner of the Immigration and Naturalization Service; the Immigration and Naturalization Service; and Joel L. Rogers, as Acting District Director of the Chicago District of the Immigration and Naturalization Service.[1]

[1] Pursuant to Sup. Ct. R. 40, they are substituted for the originally named government officials who were Griffin Bell, Cyrus Vance, Leonel Castillo, and David Vandersall, respectively. The respondents are referred to collectively as "the government."

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In The

Supreme Court of the United States

October Term, 1981

IMELDA CONTRERAS DE AVILA, et al.,

Petitioners,

vs.

WILLIAM FRENCH SMITH, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully request a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on March 10, 1981.

OPINIONS BELOW

The opinion of the Seventh Circuit, issued on March 10, 1981, is found at 643 F. 2d 471. The opinion is appended at pp. 1a-14a, *infra*. The Memoranda of Decision of the district court were issued on May 18, 1979, and February 27, 1980, a Permanent Injunction was issued on February 27, 1980, and an Amended Final Judgment Order was issued on March 14, 1980. As none of these opinions and orders was officially reported, they are appended at pp. 15a-56a, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(i) and Sup. Ct. R. 17.1(c) to review a judgment of the Seventh Circuit Court of Appeals, entered on March 10, 1981. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on June 8, 1981, three judges dissenting, p. 57a, *infra*.

STATUTORY PROVISIONS INVOLVED

Section 202(a) of the Immigration and Nationality Act, as effective in 1977, provides, in part:

> That the total number of immigrant visas made available to natives of any single foreign state under paragraphs (1) through (8) of section 1153(a) of this title shall not exceed 20,000 in any fiscal year.[1] 8 U.S.C. §1152(a) (1976), *as amended*, Act of March 17, 1980, Pub. L. 96-212, Title II, §203(b), 94 Stat. 107.

8 U.S.C. §1101 note provides:

> The foregoing provisions of this Act, including the amendments made by such provisions, shall become effective on the first day of the first month which begins more than sixty days after the date of enactment of this Act.[2]

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[1] The preference system set out at 8 U.S.C. §1153(a) became applicable to Mexico pursuant to the 1976 Amendments, 8 U.S.C. §1151(a) (1976), *as amended*, 8 U.S.C. §1151(a) (1976 Ed. Suppl. III).

[2] The cited provision is section 10 of the 1976 Amendments to the Immigration and Nationality Act, Pub. L. 94-571, 90 Stat. 2703, 2707. The 1976 Amendments are found in their entirety at pp. 58a-65a, *infra*.

STATEMENT OF THE CASE

1. This case involves the government's failure to allocate 13,366 visas authorized by Congress under the 1976 Amendments to the Immigration and Nationality Act (1976 Amendments), Pub. L. 94-571, 90 Stat. 2703, to Mexican visa applicants during fiscal year 1977. These visas confer lawful permanent resident status on qualified aliens seeking to reside in the United States. An alien becomes qualified for a visa on the basis of meeting statutory eligibility criteria. *See* 8 U.S.C. §1182.

2. Prior to January 1, 1977, immigration to the United States from the Western Hemisphere[3] was regulated solely by a 120,000 limit on visa issuances in any fiscal year. §21(e) of the 1965 Amendments to the Immigration and Nationality Act (1965 Amendments), Pub. L. 89-236, 79 Stat. 911, 921; 8 U.S.C. §1101(a)(27) (1970), *as amended* 8 U.S.C. §1101(a)(27) (1976). Visa applicants were processed strictly on a first-come, first-served basis. Such visa applicants were termed "special immigrants." *Id.* In contrast, Eastern Hemisphere visa applicants were processed in order of preferences defined by familial relationships and labor skills, subject to both a per country limit of 20,000 and a hemisphere quota of 170,000. 8 U.S.C. §1151(a) (1970), *as amended*, 8 U.S.C. §1151(a) (1976 Ed., Suppl. III); 8 U.S.C. §§1152(a), 1153(b) and (c). The 1976 Amendments applied the Eastern Hemisphere preference system and the 20,000 per country limit on preference immigration to the Western Hemisphere. The 120,000 Western Hemisphere quota was unchanged. 8 U.S.C. §1151(a) (1976), *as*

[3] The Western Hemisphere is defined as North, South, and Central America and adjacent islands. 22 C.F.R. §42.1 (1976).

amended, 8 U.S.C. §1151(a) (1976 Ed. Supp. III); 8 U.S.C. §1152(a). The 1976 Amendments became effective on January 1, 1977, after one-quarter of fiscal year 1977 had elapsed. 8 U.S.C. §1101 note.[4]

3. During the first quarter of 1977 (October-December 1976), before the 1976 Amendments became effective, Mexican visa applicants were issued 14,203 special immigrant visas pursuant to §21(e) of the 1965 Amendments. For the remaining nine months of fiscal year 1977, the government issued 5,435 preference visas to Mexican visa applicants, i.e., visas available under the new preference system that the 1976 Amendments established for the Western Hemisphere. The government charged both the special immigrant visas issued before the effective date of the 1976 Amendments *and* the preference visas issued after the effective date against the Mexican per country limit of 20,000, in effect reaching the 20,000 limit.

4. Of the 120,000 visas authorized by Congress for allocation to Western Hemisphere visa applicants in fiscal year 1977, only 106,634 visas were actually issued. The remaining 13,366 visas were available for issuance in fiscal year 1977. However, these visas were not allocated as all visa demand by non-Mexican Western Hemisphere visa applicants had been satisfied. Further, the outstanding Mexican demand was not satisfied as the 20,000 limit on Mexican immigration was reached, due to the charging of the 14,203 special immigrant visas to this limit. Absent the charging of these special immigrant visas to the 20,000 limit, the 13,366 unused visas would have been allocated to Mexican visa applicants.

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[4] Fiscal year 1977 extended from October 1, 1976, to September 30, 1977.

5. The named Plaintiffs in this action are visa applicants qualified for consideration for preference visas under the 1976 Amendments, and their sponsoring U.S. citizen and permanent resident alien relatives (referred to collectively as the "visa applicants"). On March 29, 1978, they sued the government, claiming that the government's application of the 20,000 limit on Mexican preference immigration to the special immigrant visas issued in the three months of the fiscal year prior to the effective date of the 1976 Amendments unlawfully reduced Mexican preference immigration authorized by Congress for fiscal year 1977 by 13,366 visas. The visa applicants further claimed that the statute required the 20,000 limit to be applied only to the preference visas issued in fiscal year 1977, all of which were issued subsequent to January 1, 1977. This prospective interpretation of the 1976 Amendments would permit the full allocation of the 13,366 unissued visas to Mexican visa applicants.

6. The District Court:

(a) Certified a class consisting of Mexican visa applicants and their sponsoring relatives and subsequently granted partial summary judgment in favor of the visa applicants.

(b) Ruled that the government unlawfully reduced the level of Mexican preference immigration in fiscal year 1977 by charging the visas issued in fiscal year 1977 before the effective date of the 1976 Amendments to the Mexican quota on preference visas implemented by the 1976 Amendments. Memorandum Decision of May 18, 1979, p. 32a, *infra*. Accordingly, it determined that the 13,366 visas authorized by Congress for use in fiscal year 1977 were available to be allocated to the waiting Mex-

ican preference visa applicants. However, the district court decided that since the 20,000 quota only applied to nine months of fiscal year 1977, only a pro rata share of the 20,000 limit should be available, or 15,000 preference visas. As 5,435 preference visas were already issued, 9,565 remained to be allocated. *Id.*, p. 33a, *infra*.

(c) Certified two subclasses, for the purpose of relief, to be represented by separate counsel. Memorandum Decision of September 17, 1979, pp. 66a-70a, *infra*. This division recognized that there were more waiting visa applicants than visas available under the district court's decision, and thus that the two subclasses might have competing claims for the limited pool of visas. Memorandum Decision of May 18, 1979, pp. 25a-27a, *infra*.

(d) Entered a Final Judgment providing for the issuance of the 9,565 preference visas to the two subclasses. Amended Final Judgment Order, dated March 14, 1980, pp. 53a-56a, *infra*. The district court also issued a Permanent Injunction that allowed those members of the subclasses previously identified as likely to be considered for these 9,565 visas to remain in the United States until they were processed for visas. Permanent Injunction dated February 27, 1980, pp. 48a-52a, *infra*.

6. On March 10, 1981, the Seventh Circuit reversed the judgment of the district court, ruling that the special immigrant visas issued prior to January 1, 1977, were chargeable to the 20,000 limit even though these visas were not preference visas. p. 13a, *infra*.

REASONS FOR ALLOWANCE OF THE WRIT

THE GOVERNMENT'S FAILURE TO ALLOCATE 13,366 VISAS AUTHORIZED BY CONGRESS UNDER THE IMMIGRATION AND NATIONALITY ACT RAISES AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION WHICH HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

A. The Government's Failure To Allocate 13,366 Visas So Substantially Affects Such A Large Group Of Persons Seeking Lawful Residence In The United States As To Render The Question Important.

This case presents this Court with the opportunity to examine, for the first time, the visa processing system. The specific question raised is an important one in two respects. First, if the Court of Appeals' decision is allowed to stand, a substantial number of visa processing opportunities will be lost. This Court has previously recognized that a decision affecting a sizeable class may signify an important case in the immigration context. *See Rogers v. Quan*, 357 U.S. 193, 194 (1958), *Bridges v. Wixon*, 326 U.S. 135, 146, 166 (1945). See also *Securities and Exchange Commission v. Capital Gains Research Bureau*, 375 U.S. 180, 185 (1963); *Patterson v. Lamb*, 329 U.S. 539, 541 (1947).

Second, the rights and values at issue here are especially important. The visas involved here confer lawful permanent resident status to aliens, i.e., the opportunity for permanent reunification with close family members, gainful employment in the United States, and the possibility of acquiring United States citizenship. *See Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, ... U.S. ....., 65 L. Ed. 2d 1151, 1156-1157 (1980) (Powell, J., in chambers).

B. Under The 1976 Amendments To The Immigration And Nationality Act Only Visas Issued After January 1, 1977, Should Have Been Charged Against The 20,000 Mexican Preference Limit And The Government Should Have Allocated The 13,366 Visas Not Issued In Fiscal Year 1977 To Mexican Visa Applicants.

Two statutory provisions govern this case. The first concerns the 20,000 per country limit on preference immigration. The 20,000 per country limit is expressly and exclusively linked to the issuance of preference visas:

> . . . the total number of immigrant visas and the number of conditional entries made available to natives of any single foreign state *under paragraphs (1) through (8) of section 1153(a) of the title* [i.e., the categories under the preference system] shall not exceed 20,000 in any fiscal year. 8 U.S.C. §1152(a) (1976) *as amended*, Act of March 17, 1980, Pub. L. 96-212, Title II, §203(b), 94 Stat. 107. (Emphasis added).

The second provision is the one declaring the effective date of the imposition of the preference system, with its 20,000 ceiling, on the Western Hemisphere:

> The foregoing provisions of this Act, *including the amendments made by such provisions*, shall become effective on the first day of the first month which begins more than sixty days after the date of enactment of the Act. §10 of the 1976 Amendments, 90 Stat. 2707. (Emphasis added).

As the 1976 Amendments were enacted on October 20, 1976, they became effective in their entirety on January 1, 1977. *See* 8 U.S.C. §1101 note.

The government treated the first provision as a broad fiscal year quota, limiting more than the preference immigration to which it refers. The government charged all visas issued to Mexican nationals in fiscal year 1977 against the Mexican 20,000 limit, even though only some

5,465 of these visas were preference visas. The remaining 14,203 special immigrant visas had been issued in fiscal year 1977, but prior to the effective date of the 1976 Amendments and pursuant to the statutory authorization of the 1965 Amendments governing Western Hemisphere immigration. *See* §21(e) of the 1965 Amendments, 79 Stat. 921. The 13,366 preference visas not issued in fiscal year 1977 would have been issued to Mexican visa applicants, but for the charging of the special immigrant visas to the 20,000 limit on Mexican preference immigration.

Whether read in conjunction or separately, the two statutory provisions mandate an alternative interpretation from the one the government adopted and the Court of Appeals accepted. The 20,000 limit on Mexican immigration was a limit on preference immigration; it did not apply to special immigrant visa issuances. Moreover, the preference system became effective on January 1, 1977. Thus, the 20,000 Mexican limit also became effective on January 1, 1977. Prior visa issuance patterns during the first three months of fiscal year 1977 were of no consequence to the proper implementation of these two provisions of the 1976 Amendments.

The Court of Appeals justified the government's interpretation of the two provisions, asserting that the legislative history indicated Congress intended to impose the 20,000 limit on preference immigration at the beginning of the fiscal year. Congress' failure to actually provide for this result in the statute is ascribed to inadvertence. pp. 11a, 13a, *infra*. A careful reading of the legislative history demonstrates that this conclusion is without any foundation.

The Court of Appeals' decision treats the 20,000 per country limit as an independent provision of the 1976 Amendments, which can be understood and applied

without any consideration of the other provisions of the immigration laws. In this context, the decision views the 20,000 limit as a blanket prohibition against issuance of more than 20,000 visas of any kind to a single country in fiscal year 1977. This analysis disregards the clear congressional purpose of favoring the immigration of preference visa applicants up to a per country limit of 20,000 preference visas.

The 1976 Amendments were intended to facilitate immigration by relatives of United States citizens and permanent resident aliens and conform the Western Hemisphere visa issuance process with the preference system then governing Eastern Hemisphere immigration. *H. Rep. No. 94-1553 on H.R. 14535, H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 1 (1976) ("1976 *House Report*") as reprinted in [1976] *U.S. Code Cong. and Adm. News*, 6078, 6081. The 20,000 ceiling on preference immigration placed all countries on an equal footing in competing for the limited pool of preference visas, thereby abolishing any considerations of national origin in the immigration system. Instead, the law would provide for prospective uniform treatment among Western Hemisphere countries. *Id.* at 6081.

> The purpose of this bill is to eliminate inequities in existing law regarding the admission of immigrants from countries in the Western Hemisphere. Toward this end, it extends to the Western Hemisphere the seven-category preference system (with minor modifications), the 20,000 per country limit, and the provisions for adjustment of status currently in effect for Eastern Hemisphere countries. *Id.*, at 6073.

Congress also expressed concern about the extended backlog of Western Hemisphere visa applicants, characterizing the long waiting list and delays as "unfore-

seen and unintended" results of the 1965 Amendments. 1976 *House Report*, at 6074, 6075.[5] Congress sought through the imposition of the preference system with its per country limits to reduce the backlog and expedite the reuniting of families. *Id.*, at 6076, 6078, 6079.

Numerous other references in the legislative history support this general proposition, i.e., that the goals of uniform treatment and facilitation of reunification of families were to be achieved by tying the 20,000 limit to preference immigration. *See* 1976 *House Report*, at 6075-6077, 6079, and 6085. Neither the government nor the Court of Appeals cites a single contrary suggestion in the legislative history. There is no such suggestion.

The application of the 20,000 ceiling to visa issuances in the three months of the fiscal year prior to the implementation of the preference system in fact restricted opportunities for Mexican preference visa applicants with close familial ties to United States citizens and permanent residents. Moreover, the government's interpretation did not aid any non-Mexican preference applicants in obtaining visas, as all non-Mexican preference visa demand was satisfied. Thus, the undue limitation on Mexican immigration did not foster higher levels of immigration from other Western Hemisphere countries.

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[5] The Court of Appeals makes the bald assertion that Congress was unaware of the large Western Hemisphere waiting list. p. 12a, *infra*. The passage quoted here and another found in the 1976 *House Report* at p. 6073 clearly indicate that Congress was not only aware, but also troubled by, the waiting list problem.

Absent any benefit to non-Mexican visa applicants, the Court of Appeals nonetheless seemed concerned with the possibility that Mexico would receive a disproportionate share of visas in fiscal year 1977 under either the visa applicants' or the district court's interpretation. *See* p. 11a, *infra*. This concern is based on a misreading of the legislative indicators.

First, Congress was well aware that Mexico had the highest level of visa demand among Western Hemisphere countries under the prior immigration system.[6] Nothing in the legislative history suggests that the changes in the 1976 Amendments would preclude Mexico from continuing to have the highest volume of immigration in the Western Hemisphere.[7]

Second, Congress knew that high visa demand had a direct impact on the relative distribution of visas among countries governed by a hemispheric preference system. In 1965, the Department of State had told Congress that implementation of the Eastern Hemisphere preference system would result in some oversubscribed countries and other undersubscribed countries, leading to much

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[6] Between 1968 and 1976, Mexico experienced the highest visa demand in the Western Hemisphere. Approximately forty percent of each year's Western Hemisphere quota (45,000 visas) was used by Mexican visa applicants. Congress considered permitting Mexico and Canada to have a ceiling of 35,000 visas under the 1976 Amendments, but rejected this approach in favor of a system that eliminated consideration of national origin or geographic proximity to the United States. 1976 *House Report*, at 6081.

[7] The Seventh Circuit recognized this fact in *Silva v. Bell*, 605 F. 2d 978, 981 (7th Cir. 1979).

higher issuances to the oversubscribed countries.[8] Congress evidenced no concern in 1965, nor in 1976, that preference visas would be distributed to the various countries in a hemisphere in accordance with the relative size of demand, rather than by some principle of strict numerical equality.

Third, there was every reason to make the 13,366 preference visas available to Mexican nationals, once it became apparent that the visas would not be needed by non-Mexicans. Issuance of the 13,366 visas contributed to the goals of family reunification and reduction of the waiting list, without infringing on the rights of any non-Mexican visa applicants.

The legislative history also clearly indicates the reason Congress adopted a delayed implementation date. The proposed amendments, on their face, provided for a sixty-day delay in implementation to allow lead time for setting up the preference system in the Western Hemisphere. Both the Department of Justice and the Department of State expressly approved of a delayed implementation date, and in fact requested a ninety-day delay. *See* Letter of Robert J. McCloskey, Assistant Secretary of Congressional Relations, Department of State, dated September 22, 1975; Letter of Michael Ullmann, Assistant Attorney General, dated May 3, 1976, 1976 *House Report*, at 6092 and 6099.

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[8] "The nationals of other countries which have been oversubscribed will have already had on file applications and therefore they will get the larger bulk of the numbers . . . This will last only for a period of 2 to 3 years and after that point, everyone will be on an equal footing. . . ." Testimony of Barbara Watson, Acting Administrator, Bureau of Security and Consular Affairs, Department of State, *Hearings on the Operation of the Immigration and Nationality Act as amended by the Act of October 3, 1965 before Subcommittee No. 1 of the H. Comm. on the Judiciary*, 90th Cong., 2nd Sess. Ser. 23, at 16 (1965).

There is thus absolutely no support in the legislative history for the implementation of the 20,000 ceiling at the start of the fiscal year (October 1, 1976). Rather, every legislative indication supports the conclusion that Congress authorized up to 20,000 preference visas to be made available to Mexican visa applicants in the nine months of fiscal year 1977 to which the preference system was applicable. Thus, the 13,366 visas should properly have been allocated to Mexican visa applicants.[9]

In light of the clear expressions of legislative intent cited above, the Court of Appeals' characterization of Congress' failure to implement the 20,000 limit at the start of the fiscal year as due to "inadvertence" is baseless. *See* pp. 11a, 13a, *infra*. Congress knew how to tie a quota provision to a fiscal year when it wanted to ac-

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[9] There is ample support for the general proposition that the full number of visas authorized should be issued, given sufficient demand.

> Based upon . . . estimated qualified demand, the Department of State *will allocate the requested numbers to the extent of their availability . . . S. Rep. No. 748 on H.R. 2580, S. Comm. on the Judiciary* 89th Cong., 1st Sess., *U.S. Code Cong. & Admin. News*, 3328, 3338 (1965). (Emphasis added).

The government shared this understanding.

> "It has always been . . . the view of the Visa Office that the establishment of the numerical limitations on immigration by the Congress had two significances: the statutor[ily] expressed one that immigration should not exceed the limitations established, but also an intent on the part of the Congress that immigration actually be allowed up to those limits if the demand existed for it, and that that imposed on us some obligations to process up to those limits when the demand existed for it." 1978 Deposition of Cornelius D. Scully, III, at II-20, pp. 71a-72a, *infra*.

See Silva v. Bell, 605 F.2d at 988. *See also Train v. City of New York*, 420 U.S. 35 (1975).

complish such a result. Six months prior to consideration of the 1976 Amendments, Congress had adjusted the Western Hemisphere quota to accommodate a change in federal fiscal years generally that resulted in a fifteen month fiscal year. The Fiscal Year Transition Act raised the 120,000 quota to 150,000 for that extended year. §118 of the Fiscal Year Transition Act, 90 Stat. 383, 389 (April 21, 1976). Similarly, in the 1980 Amendments to the Immigration and Nationality Act, which took effect in the middle of fiscal year 1980, Congress specifically provided that the Amendments ". . . shall apply to fiscal years beginning with the fiscal year beginning October 1, 1979." Title II, §204(a) of the Act of March 7, 1980, Pub. L. 96-212, 94 Stat. 102, 108. Congress further provided for different effective dates for various provisions of the 1980 Amendments. *Id.*, at §204(b).

The regulation of the flow of immigration is an area in which Congress exercises plenary power. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765-766 (1972); *Galvan v. Press*, 347 U.S. 522, 531 (1954). As a result, this Court has shown extreme deference to the Congressional mandate in the immigration area, *Id.*, and this Court should be especially reluctant to sanction the Court of Appeals' departure from the literal command of the 1976 Amendments. Adherence to this clear statutory direction is especially important when nothing in the legislative history supports the charging of visas issued prior to implementation of the preference system to the 20,000 limit on preference visas. Rather, the plain meaning of the 20,000 limit and implementation provisions of the 1976 Amendments was consistent with the expressed goals of family reunification and uniform treatment. By abandoning the statutory language in order to advance

an alternative scheme for implementing the 20,000 limit, the Court of Appeals frustrated the central goals of the new immigration system Congress enacted and denied thousands of Mexican visa applicants opportunities to immigrate to the United States.

CONCLUSION

The writ of certiorari requested should be issued.

Respectfully submitted,

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APPENDICES

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 80-1590, 80-1680 and 80-1681

IMELDA CONTRERAS DE AVILIA, FIDEL OCAMPOOCAMPO, CANDELARIO ESCOBAR DE OCAMPO, et al.,

Plaintiffs-Appellees and Cross-Appellants,

v.

BENJAMIN CIVILETTI, et al.,

Defendants-Appellants and Cross-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 78 C 1166—**Prentice H. Marshall**, Judge.

ARGUED DECEMBER 4, 1980—DECIDED MARCH 10, 1981

Before CUMMINGS and WOOD, *Circuit Judges*, and BARTELS, *Senior District Judge.**

BARTELS, *District Judge.* This is an appeal by the United States Government and by the plaintiffs, a group of Mexican visa applicants, from an amended final order and permanent injunction against the application by the State Department of its interpretation of the Immigration and Nationality Act Amendments of 1976, P.L. No.

* The Honorable John R. Bartels, Senior United States District Judge for the Eastern District of New York, sitting by designation.

94-571, 90 Stat. 2703-2707, *amending* 8 U.S.C. §§ 1101 *et seq.* ("the 1976 amendments").

The 1976 amendments imposed a limitation of 20,000 per fiscal year on immigration from any Western Hemisphere country.[1] The government's fiscal year runs from October 1 to September 30, but the 1976 amendments did not become effective until January 1, 1977, after one full quarter of fiscal year 1977 had expired. During that first quarter, 14,203 visas were issued to Mexicans pursuant to the immigration system which prevailed in the Western Hemisphere before the new law became effective. The State Department nevertheless charged those visas against the newly-imposed national quota of 20,000, leaving only 5797 visas available for Mexican immigrants between January 1 and September 30, 1977, of which 5435 were actually issued.[2]

A group of Mexican visa applicants and their sponsoring relatives ("the applicants") filed a class action in the United States District Court for the Northern District of Illinois, claiming that the State Department's[3] application of the per country quota resulted in an underallocation of visas to them in fiscal year 1977, in that the first quarter visas should not have been charged against Mexico's annual allotment. The applicants sought "recapture" of 13,366 unissued visas for the benefit of class members currently on the immigrant waiting list.

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[1] The Western Hemisphere is defined as North America (including Central America), South America and adjacent islands. 22 C.F.R. § 42.1 (1980).

[2] As a result of procedures in the visa issuance system not at issue here, actual issuances do not always match the authorized level of allocation.

[3] Named as defendants in this action are the United States Department of State, the Secretary of State, the Department of Justice and the Attorney General, the Immigration and Naturalization Service and its commissioner. In the discussion, however, only the State Department, whose policy has given rise to this lawsuit, will be mentioned.

The district court held that the State Department should not have charged, against the 20,000 limitation, visas issued in the Western Hemisphere prior to the effective date of the 1976 amendments, January 1, 1977, and that the quota should have been applied *pro rata* to the three quarters of fiscal year remaining after that date. Under this construction 15,000 visas should have been issued to Mexicans between January 1 and the end of the fiscal year on September 30, 1977. Accordingly, the trial judge ordered the recapture of 9565[4] visas for the benefit of the plaintiff class. Since there were conflicting interests among the applicants as to the proper allocation of recaptured visas, the judge certified two subclasses to argue this issue.[5] He adopted a

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[4] The district court allocated 15,000 visas to Mexicans from January 1 to September 30, 1977, but the State Department actually issued only 5435 visas to Mexicans during this period. The difference between the two figures is 9565.

[5] The first subclass consisted of "preference" applicants, and was defined to include:

> All current preference immigrant visa applicants who are natives of Mexico, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to preference status on the basis of such familial relationships.

The second subclass consisted of "non-preference" applicants, and was defined to include:

> All current non-preference immigrant visa applicants who are natives of Mexico, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to non-preference status on the basis of such familial relationships.

The terms "preference status" and "non-preference status" refer to the visa applicant's entitlement, or non-entitlement to a preference under the eight category system provided for allocation of visas in section 1153(a) of the Immigration and Nationality Act, *See* note 7, *infra*, and accompanying text.

The two subclasses had adversary interests in the relief ordered because any visas recaptured would have to be allocated in accordance with section 1153(a).

formula for allocation of the recaptured visas, and ordered injunctive relief providing, *inter alia*, that applicants in this country who were likely to receive visas pursuant to the court's decision could not be deported pending their issuance. All parties have appealed, seeking reversal of all or part of the district court's disposition of the case. We are required to interpret a statute which, because of its effective date of January 1, 1977, purporting to cover the fiscal year beginning October 1, 1976, has created an ambiguous gap as to the application of visas issued before January 1, 1977 against the limitation of 20,000.

Immigration System Prior to the 1976 Amendments

To understand the action of the State Department and its adoption of the challenged construction of the 20,000 per country limit, it is necessary to appreciate the context of the problem through a brief history of the provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* ("the Act") both before and immediately after[6] the effective date of the 1976 amendments thereto, January 1, 1977. Prior to that date, immigration to this country was governed essentially by the Act of October 3, 1965, 79 Stat. 911-922 ("the 1965 amendments") which amended the basic Immigration and Nationality Act of 1952. Under the 1965 amendments what amounted to a dual system applied to immigration from the Eastern and Western Hemispheres respectively.

Immigration from the East was subject to an overall annual limitation of 170,000, 8 U.S.C. § 1151(a) (1970), while the annual fiscal year quota from the Western Hemisphere was 120,000. Section 21(e) of the 1965 amendments. The law also accorded different preferences to eight categories of Eastern Hemisphere visa applicants according to their familial relationship with United States citizens or permanent residents, posses-

[6] The Immigration and Nationality Act has been further amended since 1976, effecting changes not here germane.

sion of certain professional skills, or refugee status. 8 U.S.C. § 1153(a)(1)-(8).[7] Each of seven so-called "preference" categories was allocated a percentage of the overall hemispheric quota, and those preferences based on family ties to United States citizens or permanent residents were also entitled to unused visas from a higher category. The eighth, so-called "non-preference" category received only visas unused by the seven preference groups. In addition to the 170,000 limit on immigration from the Eastern Hemisphere as a whole, the 1965 amendments provided that the number of immigrants from any Eastern country not exceed 20,000 per fiscal year. 8 U.S.C. § 1152(a) (1970).

The provisions governing immigration from Western Hemisphere nations were markedly different from those in effect with respect to the rest of the world. Although immigration from this hemisphere was limited to 120,000 per fiscal year, this limitation was not incorporated into the Immigration and Nationality Act itself. Moreover, Western Hemisphere immigrants were defined

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[7] Paraphrased, the preference categories set out in 8 U.S.C. § 1153(a) are as follows:

(1) unmarried children of United States citizens: 20%;

(2) spouses and unmarried children of permanent residents: 20%, plus any unused visas from category (1);

(3) "members of the professions, or [those] who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States" and whose services are sought by a United States employer: 10%;

(4) married children of United States citizens: 10% plus any unused visas from preferences (1)-(3);

(5) siblings of United States citizens over twenty-one years old: 24%, plus unused visas from categories (1)-(4);

(6) immigrants capable of performing certain jobs for which a shortage of labor exists in this country: 10%;

(7) conditional entries made available to refugees by the Attorney General: 6%;

(8) residual category [non-preference]: unused visas from preferences (1)-(7).

as "special immigrants", 8 U.S.C. § 1101(a)(27) (1970), and were not subject to any annual per country quota. 8 U.S.C. § 1153(a) (1970). In the absence of such a limitation, Mexico annually accounted for 40-45,000 immigrants per year, or upwards of a third of the overall hemispheric quota.

The eight category preference system set out in section 1153(a) of the Act did not apply to Western Hemisphere visa applicants either. Instead, such applicants were required to obtain a labor certification from the United States Secretary of Labor, or show exemption from this requirement based on certain familial relationships to United States citizens or permanent residents. 8 U.S.C. §1182(a)(14) (1970). Congress did not establish a system for processing special immigrants and the State Department administratively established the policy of processing such visa applicants in strict chronological order according to the "priority date" on which they had either obtained a labor certification or submitted documentation showing exemption therefrom. 22 C.F.R. §§ 42.62, 42.63 (1975).

Changes by the 1976 Amendments

The Immigration and Nationality Act Amendments of 1976 wrought a number of changes in the Act. In effect, the special legislation that had governed the Western Hemisphere was repealed, and Western Hemisphere immigrants were made subject to the same immigration system that had governed the rest of the world since 1965. The most significant change that the 1976 amendments accomplished was the imposition on the Western Hemisphere of the 20,000 limitation on immigration from any one country and along with it the eight category preference system theretofore applicable only in the Eastern Hemisphere.[8] While the 120,000

[8] A savings clause provided that those on immigration waiting lists as of the effective date of the 1976 amendments would be treated as lowest priority, "non-preference" applicants under the amended Act, with the right to show

(Footnote continued on following page)

Western Hemispheric quota remained in effect, section 1152(a) of the Act, now applicable to both hemispheres, provided that:

> [T]he total number of immigrant visas . . . *made available* to natives of any single foreign nation *under paragraphs (1) through (8) of section 1153(a) of this title shall not exceed 20,000 in any fiscal year.*

8 U.S.C. § 1152(a) (1976) (emphasis added).

This dispute arises from the fact that section 1152(a) did not indicate whether visas issued to special immigrants in the first quarter of fiscal year 1977 were to be counted towards the 20,000 quota. The 14,203 visas issued to Mexicans in that time had clearly not been "made available . . . under . . . section 1153(a)" as that provision was not yet in effect with respect to the Western Hemisphere. The State Department nevertheless adopted a policy (the "cross-systems charging policy") of counting the first quarter visas towards each Western Hemisphere country's national quota. As a result, only 5797 visas were allocated to Mexico in the final three quarters of the fiscal year, of which only 5435 were actually issued. Due to administrative difficulties in implementing the new system in the first year of its operation, actual visa issuances in the Western Hemisphere in fiscal year 1977 fell short by 13,366 of the hemispheric quota. It was these unissued visas that the plaintiffs sought to recapture in their lawsuit.

Discussion

The imposition on Western Hemisphere countries after the beginning of the fiscal year of a quota manifestly intended to apply on a full fiscal-year basis created an ambiguity in the Act as to visas issued in the first quarter of fiscal year 1977. As the district court

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[8] *continued*
entitlement to a higher preference. Section 9(b) of the Immigration and Nationality Act Amendments of 1976 (1976).

noted in its opinion, three solutions to this ambiguity are possible. The approach adopted by the State Department was to charge all visas issued in the fiscal year against the quota, despite the absence of an explicit mandate for doing so. The plaintiffs, on the other hand, advocate giving no effect at all to the quota with respect to the first quarter of the fiscal year. In their view, a full 20,000 visas should have been issued to Mexicans in the last three quarters of fiscal year 1977. The third resolution, and the one adopted by the district court, was to apply the 20,000 quota on a *pro rata* basis over the portion of fiscal year 1977 during which the 1976 amendments were effective, so that ¾ of 20,000, or 15,000 visas would be allocated to Mexicans during the last three quarters of the fiscal year.

In choosing among these different approaches, it becomes necessary to ascertain and effectuate the legislative purpose in enacting the 1976 amendments. *Philbrook v. Glodgett*, 421 U.S. 707 (1975). To that end, it is important to note that the interpretation of the State Department, the agency statutorily entrusted with administration of the Immigration and Nationality Act, 8 U.S.C. § 1104, is entitled to substantial deference, *Quern v. Mandley*, 436 U.S. 725, 738 (1978), and should be followed "unless there are compelling indications that it is wrong." *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421 (1973) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)). With these principles in mind, we examine the validity of the three possible interpretations.

The State Department's responsibility for administering the Immigration and Nationality Act includes the provisions relating to numerical limitations on immigration. 8 U.S.C. §§ 1104, 1152(b)&(d), 1153(e). In construing its obligations the State Department relies primarily on the legislative history of the 1976 amendments to support its cross-systems charging policy. It is clear from the following language in House Report No. 94-1553, which accompanied the bill, that Congress intended to eliminate disparities in immigration matters among Western Hemisphere countries and between the

two hemispheres, ensuring that all nations be treated alike:

> During the 94th Congress, a general consensus has been reached that the 20,000 per country limit should be extended to all countries of the world, including those geographically contiguous to the United States. Such a provision is included in the Administration's immigration bill. H.R. 10323, in contrast to Administration support during the 93rd Congress of a 35,000 allotment for the contiguous countries . . . .
>
> The decision by this Committee to limit all countries to 20,000 has been based primarily on the desire that this legislation mark the final end of an immigrant quota system based on nationality, whether the rationale behind it be the alleged national origins of our citizenry, as it was in the past, or geographical proximity—the argument previously advanced for preferential treatment of Canada and Mexico. The proposed legislation rejects the concept of a "special relationship" between this country and certain other countries as a basis for our immigration law, in favor of a uniform treatment for all countries.

H.R.Rep. No. 94-1553, 94th Cong., 2d Sess. 8-9, *reprinted in* [1976] U.S. Code Cong. & Adm. News 6080-81.

In considering an earlier bill to amend the Immigration and Nationality Act, the House rejected a provision giving Mexico a 35,000 annual limitation, as opposed to the generally applicable 20,000 limit. 119 Cong.Rec. 31456-64. The State Department thus argues that it would have violated the clearly-expressed Congressional intent that immigration from no country exceed 20,000 per year, if it had allocated more than 5797 visas to Mexicans in the final three quarters of fiscal year 1977.

The plaintiffs, in support of their position, cite the plain language of section 1152(a), which limits to 20,000 per year only those visas issued pursuant to section 1153(a). They point out that the 14,304 visas issued to Mexicans in the first quarter of fiscal year 1977

were not made available pursuant to section 1153(a), as that provision was not in effect until January 1, 1977, after the first quarter of the fiscal year had expired. Invoking the maxim of statutory interpretation *expressio unius est exclusio alterius*, they contend that by mentioning only visas issued pursuant to § 1153(a), Congress meant to exclude from the 20,000 quota visas issued under the pre-1976 amendments system. They further contend that the State Department's cross-systems charging policy gave retroactive effect to the quota by applying it to visas issued before its effective date, interfering with their "settled expectations" and "antecedent rights" to the issuance of visas. Citing settled immigration practice that numerical limits on visa issuance are also mandatory levels that must be reached, *Silva v. Bell*, 605 F.2d 978, 988 (7th Cir. 1979), the applicants claim that they were entitled to the issuance of a full 20,000 visas in that portion of fiscal year 1977 during which the 1976 amendments were in effect.

The district court held that the State Department's interpretation of the 1976 amendments was "both unreasonable and contrary to Congressional intent", stressing that the 14,203 visas issued to Mexicans in the first quarter of fiscal year 1977 were not required by the literal language of section 1152(a) to be counted towards the national quotas. The district court reasoned that the quota applied only to those visas "made available" under the preference system as applied to Western Hemisphere immigrants for the first time on January 1, 1977, and thus did not include visas issued between October 1, 1976 and December 31, 1976. Acknowledging that the 1976 amendments' legislative history indicated Congress' desire to limit all countries to 20,000 visas annually, the court concluded that this objective had no effect prior to the amendments' effective date, January 1, 1977. In its view, the cross-systems charging policy amounted to an impermissible retroactive application of the quota.

The district judge thus agreed with the plaintiffs that the State Department's application of the 1976 amendments was unlawful. Unlike the applicants,

however, the judge, in his construction of the Act, did take account of the fact that one quarter of the fiscal year had elapsed when the 1976 amendments became effective. He noted that section 2 of the 1976 amendments, 8 U.S.C. § 1151(a), provided that visa issuance should proceed at a more or less uniform rate over the course of the year,[9] and concluded that issuing a full year's quota to Mexicans in the final three quarters of fiscal year 1977 would constitute preferential treatment by allowing them to immigrate at a rate faster than that enjoyed by immigrants from other countries. The trial court held that the proper application of the 20,000 quota was to prorate it over the final three quarters of the fiscal year, and decided that members of the plaintiff class were entitled to 9565 additional visas.

While the district court's *pro rata* approach is a more plausible interpretation of the statute than the applicants', neither interpretation justifies the conclusion that the State Department's cross-systems charging policy was unreasonable. Indeed, the applicant's proposed construction is the poorest choice because it ignores the legislative history altogether. Plaintiffs and the district court were too prone to conclude that Congress' failure to refer to "special immigrant" visas in imposing the 20,000 limitation indicated its intention that such visas not be counted towards the fiscal year quota. Their argument assumes that Congress considered and rejected the option of counting those visas, *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 755 n.2 (7th Cir. 1979), an assumption which is untenable in this case. It is, however, obvious that Congress in the 1976 amendments through inadvertence failed to inform the State Department how to administer during a fraction

[9] Section 1151(a) of the Act in effect provides that visas are not to be issued at a rate exceeding approximately one quarter of the hemispheric quota per quarter of the fiscal year.

of the fiscal year a statute designed to apply on a full fiscal year basis.[10]

Where the problem of interpretation concerns a situation apparently not foreseen by the legislators, it is appropriate to consult those areas covering the same subject where expression of the legislative intent is clear, and extrapolate therefrom. *Montana Power Co. v. FPC*, 445 F.2d 739 (D.C.Cir. 1970) (*en banc*), *cert. denied*, 400 U.S. 1013 (1971). We believe Congress clearly intended that the 1976 amendments impose the same ceiling on immigration from all countries whether from the Eastern or Western Hemisphere. H.R.Rep. No. 94-1553, *supra*. By the time the State Department confronted the problem of applying the 1976 amendments to Western Hemisphere immigrants in mid-fiscal year, a large waiting list of applicants had developed, and it had no reason to expect that the 120,000 hemispheric quota would not be reached regardless of which interpretation it adopted. In a situation like this, where there were apparently not enough visas to satisfy Western Hemisphere demand, the State Department had to formulate a policy consistent with the aim of equalizing treatment of all countries. The approach it adopted avoided issuing more than 20,000 visas to nationals of any one country within the fiscal year, unlike that of either plaintiffs or the district court.

Counting visas issued during the first quarter of fiscal year 1977, before the effective date of the 1976 amendments, did not amount to a retroactive application of the quota. Visa applicants have no vested right in the issuance of a visa. *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *compare Greene v. United States*, 376 U.S. 149, 159-60 (1964). Since the cross-systems charging policy had no effect on visas already issued, it did not interfere with the "settled expectations" of any person.

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[10] It is relevant to note that the provision imposing the quota was not drafted specifically for Western Hemisphere countries. In fact, it had been in effect with respect to the rest of the world since 1965. It was simply extended by the 1976 amendments to the Western Hemisphere.

The State Department's application of the 1976 amendments is not rendered retroactive "merely because the facts or requisites upon which its subsequent action depends . . . are drawn from a time antecedent to the enactment." *Reynolds v. United States*, 292 U.S. 433, 449 (1943).

The dispute in this case arises from the gap in the 1976 amendments caused by Congress' inadvertent failure to require that Western Hemisphere visas issued in the first quarter of fiscal year 1977 be charged against the 20,000 quota. The result of such a mistake should not be given effect when to do so would pervert the manifest purpose of the statute as a whole. *United States v. Brown*, 333 U.S. 18, 26 (1948); *In re Adamo*, 619 F.2d 216, 222 (2d Cir. 1980); *United States v. Babcock*, 530 F.2d 1051, 1053 (D.C.Cir. 1976). A literal interpretation of the 1976 amendments must yield to clear contrary evidence of Congressional intent. *Nat'l Railroad Passengers Corp. v. Nat'l Assoc. of Railroad Passengers*, 414 U.S. 453 (1974); *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971).

We conclude that the State Department's cross-systems charging policy was both reasonable and consistent with the Congressional desire to eliminate disparities in immigration among all countries. To give effect to that objective, it was reasonable for the State Department to count visas issued in the first quarter of fiscal year 1977, although they had not been "made available" under paragraphs (1) through (8) of section 1153(a), which was not in effect with respect to the Western Hemisphere until January 1, 1977.

Accordingly, we hold that the district court erred in deciding that the State Department's cross-systems charging policy was unlawful. Under the circumstances, it is unnecessary to reach the other issues on appeal.

The district court's memorandum decision of May 18, 1979 is reversed, and the Amended Final Order and Permanent Injunction are dissolved.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX "B"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IMELDA CONTRERAS DE AVILA, FIDEL OCAMPO-OCAMPO, CANDELARIO ESCOBAR DE OCAMPO, et al.,

Plaintiffs,

No. 78 C 1166 *v.*

GRIFFIN BELL, as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE, CYRUS VANCE, etc., et al.,

Defendants.

MEMORANDUM DECISION

In this class action for injunctive and declaratory relief, plaintiffs, who are Mexican visa applicants and their United States citizen or permanent resident sponsors, claim that the State Department's interpretation of the Immigration and Nationality Act Amendments of 1976 (1976 Amendments), Pub. L. No. 94-571, 90 Stat. 2707, codified at 8 U.S.C. § 1101 *et seq.*, was unlawful and a violation of plaintiffs' due process rights. Plaintiffs contend that the State Department's interpretation of the 1976 Amendments had the effect of decreasing the number of permanent resident visas available in 1977 to Mexican immigrants and they seek declaratory and injunctive relief from the State Department and the Immigration and Naturalization Service (INS). Jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1361 and 8 U.S.C. § 1329. The prayer for declaratory relief is based upon 28 U.S.C. §§ 2201, 2202. Plaintiffs have moved for certification of three classes, and the parties have submitted cross motions for summary judgment.

Comprehension of the summary judgment and certification motions requires a review of the procedures for allocating permanent visas before and after the 1976 Amendments. Prior to 1977, the procedure for granting visas was determined by the 1965 Amendments to the Immigration and Nationality Act. Pub. L. No. 89-326, 79 Stat. 911. Immigrants from the Western Hemisphere obtained visas as "special immigrants." 8 U.S.C. § 1101 (a)(27)(A). Congress limited such immigration by imposing 120,000 per year limit on visas for immigrants from the Western Hemisphere, Pub. L. No. 89-236, § 21(e), 79 Stat. 911, 921, and by requiring immigrants to satisfy a labor certification requirement. *See* 8 U.S.C. § 1182(a) (14) (as amended). To fulfill the labor certification requirement, an immigrant had to obtain a finding by the Secretary of Labor that an insufficient number of workers in the United States were able to perform the job the immigrant intended to perform. Parents of adult United States citizens and spouses and minor unmarried children of United States citizens were exempt from the 120,000 quota. Pub. L. No. 89-236, § 21(e), 79 Stat. 911, 921. The 1965 Amendments also exempted from the labor certification requirement the parents, spouses, and unmarried minor children of either United States citizens or aliens with permanent residence visas. *Id.*, § 10(a), 79 Stat. at 917.

To obtain a permanent visa under the 1965 Amendments, an immigrant would first show the United States consulate that he had obtained the required Department of Labor certification or was exempt from the requirement. 22 C.F.R. § 42.61(a) (1976). The consulate would then issue the immigrant a priority date and give the applicant "immigrant status." The immigrant would then be placed on a waiting list, which was processed strictly in chronological order, without regard to the immigrant's method of qualifying for immigrant status or his country of origin. 22 C.F.R. § 42.63(a) (1976). After an immigrant's name was selected from the waiting list, and he was interviewed at the United States consulate to insure that he was entitled to a visa,

the visa was issued and the consulate issuing the visa would inform the State Department, which would then charge the visa against the 120,000 limit.

The 1976 Amendments to the Immigration and Naturality Act changed this procedure for Western Hemisphere immigrants to conform it to the procedure already in use for Eastern Hemisphere immigration. H. Rep. No. 94-1553, 94th Cong., 2d Sess., U.S. Code Cong. & Ad. News 6073 (1976). The 1976 Amendments retained the 120,000 fiscal year quota established by the 1965 Amendments.[1] In addition, the 1976 Amendments established a quota of 20,000 visas per country per fiscal year for Western Hemisphere countries as was already in effect for Eastern Hemisphere countries. 8 U.S.C. § 1152. Further, the new procedure provided for a series of preferences by which the 20,000 per country quota and the 120,000 hemispheric quota were to be allocated. 8 U.S.C. § 1153(a). The preference system, which was already in effect for Eastern Hemisphere immigration, provided for seven categories of preference based on familial relationships to United States citizens or permanent residents, professional skills, or refugee status.[2] Five of the seven preference categories are

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[1] The current statute combines the 120,000 Western Hemisphere quota with the 170,000 Eastern Hemisphere quota for a total limit on immigration of 290,000. 8 U.S.C. § 1151(a).

[2] The preference categories and their respective percentage of the 120,000 quota (now 290,000) were:

(1) Unmarried children of United States citizens: twenty percent.

(2) Spouses and unmarried children of permanent residents: twenty percent and any unused visas from preference (1).

(3) Members of the professions or those who, because of "their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests or welfare of the United States" and whose services are sought by a United States employer: ten percent.

(Footnote continued on following page)

exempt from the labor certification requirement.[3] Each preference category was allocated a percentage of the 120,000 quota, which is now a 290,000 world quota, and several are also allocated the unused visas that remain from the preceding preference categories. An eighth preference category, termed the "nonpreference" category, is allocated only the residual visas not used in the seven preference groups.

To receive a permanent visa, an immigrant first establishes to the INS that he is qualified for a particular preference. 8 U.S.C. § 1154(a); 22 C.F.R. § 42.42. The State Department then issues the immigrant "preference status" and a priority date. 8 U.S.C. § 1154(b); 22 C.F.R. § 42.61. The visa petition is then sent to the United States consulate located where the immigrant will submit a visa application. If the immigrant is already residing in the United States and meets certain qualifications, he may avoid the visit to a consulate by applying to the INS for "adjustment of status." *See* 8 C.F.R. § 204.3 and 8 U.S.C. § 1255. The applications for adjustment of status receive final interviews in the order in which the INS receives the applications. Kramer deposition; Plaintiffs' exhibit 1, at 15. Those immigrants who apply for permanent visas

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[2] *continued*

(4) Married children of United States citizens: ten percent plus any unused visas from preferences (1)-(3).

(5) Siblings of United States citizens over twenty-one years old: twenty-four percent plus unused visas from preferences (1)-(4).

(6) Immigrants capable of performing specific skilled or unskilled labor, not temporary or seasonal, for which a shortage of such workers exists in the United States: ten percent.

(7) Conditional entries made available by the Attorney General to refugees: six percent.

(8) Residual category: only the unused visas from preferences (1)-(7).

See 8 U.S.C. § 1153(a).

[3] These are preferences (1), (2), (4), (5), and (7).

through the consulates receive interviews in the order of their preference and in chronological order within each preference. 8 U.S.C. § 1153(b), (c); 22 C.F.R. § 42.63.

The Secretary of State authorizes issuance of visas based on expected demand and the availability of visas within each country quota and within each preference. If the full 20,000 quota has been used by a particular country in the previous year, the State Department allocates each preference its statutory percentage of the 20,000 quota. 8 U.S.C. § 1153(e). When a consulate issues a visa or the INS adjusts a status, the State Department charges the visa or adjustment to the applicable world, formerly hemisphere, quota and the per country and preference quotas. 8 U.S.C. § 1255, 22 C.F.R. § 42.64.

The hemisphere and per country quotas applied to the fiscal year, which begins on October 1. The effective date of the 1976 Amendments was January 1, 1977. *See* Pub. L. No. 94-571, § 10, 90 Stat. 2707. Because the 1977 fiscal year was already in progress when the amendments became effective, the defendants implemented the 20,000 per country quota by charging the visas issued during the first three months of fiscal 1977 to the 20,000 limit for each country. Although the visas issued between October 1 and December 31, 1976 were issued pursuant to the procedure established by the 1965 Amendments, for the purposes of the 20,000 per country limit the defendants treated these visas as eighth or nonpreference category visas as defined by the 1976 Amendments. *See* 8 U.S.C. § 1153(a)(8). Thus, because the applicants receiving visas issued during 1976 could not have established their entitlement to a particular preference in the as yet unborn preference system, the State Department could not categorize the 1976 visas within any of the preferences except the eighth preference residual category. Of the 26,886 visas issued to Western Hemisphere immigrants during the period October 1—December 31, 1976, 14,203 were issued to Mexican immigrants. Garner deposition; Plaintiffs' exhibit 2, at 83, 88. Consequently, only 5,797 visas remained from the 20,000 quota for Mexican im-

migrants, and only 5,435 were actually issued. *Id.* at 89. The State Department issued 106,634 Western Hemisphere visas during fiscal year 1977, leaving 13,366 visas unused from the 120,000 Western Hemisphere quota. *Id.* at 83.

In March 1978, plaintiffs brought this suit alleging that the defendants' interpretation of the 1976 Amendments was unlawful. According to plaintiffs, the 14,203 Mexican visas issued during the first three months of fiscal 1977 should not have been charged against the fiscal 1977 Mexican quota of 20,000. Inasmuch as only 5,435 visas were issued to Mexicans in fiscal 1977 under the 1976 Amendments, i.e., between the January 1, 1977 effective date of the statute and October 1, 1977, and because 13,366 visas less than the 120,000 hemispheric quota were issued to Western Hemisphere applicants during fiscal 1977, plaintiffs wish to recapture 13,366 visas for distribution to Mexican aliens, arguing that even then only 18,801 Mexicans (out of a potential 20,000) will have received visas during fiscal 1977 under the 1976 Amendments.

Class Certification

Plaintiffs wish to certify three classes. The first class consists of natives of Mexico who prior to October 1, 1977 established priority dates under the regulations in effect from 1968 to 1977 and who have not yet had final visa or adjustment of status interviews. The second class consists of all native Mexicans who are now residing in the United States with nonpreference status or approved or pending preference petitions who, but for the defendants' unlawful charging of the 14,203 October 1—December 31, 1976 visas, would have been within sixty days of receiving a visa. Class III consists of permanent residents or United States citizens who are relatives of members of those Class I members who established their priority dates and preference status on the basis of such familial relationships. Plaintiffs seek distribution of the

recaptured visas to the members of Class I and to enjoin the deportation of members of Class II.[4]

Defendants, however, contend that we should not certify any of these classes. Noting the general rule that nonresident aliens have no standing to invoke the jurisdiction of the United States courts, defendants challenge the standing of members of Class I who are not residents of the United States. Defendants further contend that a conflict of interest exists among the members of Class I which precludes representation of the members of Class I by one counsel. Defendants perceive a conflict arising from the peculiar nature of the transition year of 1977. Because the Western Hemisphere preference system did not take effect until January 1, 1977, the time necessary to complete an application under the preference system caused a lag between the effective date of the 1976 Amendments and the receipt of the first preference application. The flow of preference petitions during 1977 did not approach the rate of applications in 1978 when the application procedure was in full gear. Therefore, according to defendants, many of the visas issued during 1977 were issued to nonpreference aliens, because the State Department attempts to issue the visas at a uniform rate from month to month and the demand for preference petitions was insufficient, particularly during the first part of 1977. Forty percent of the visas issued between January 1, 1977 and October 1, 1977 were issued to nonpreference applicants. *See* Garner declaration, Defendants' exhibit 4. This pattern would have remained the same even if the defendants had issued an additional 13,000 visas during 1977.

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[4] Under 8 C.F.R. § 242.5(a)(2)-(3), as amended by 43 Fed. Reg. 29526 (July 10, 1978), an alien who has a priority date no later than sixty days after the date shown in the latest Visa Office bulletin representing what priority date is first on the waiting list for a particular country and preference, and has applied for an immigrant visa at an American consulate which has accepted jurisdiction of the case, is granted relief from deportation.

Therefore defendants argue that on the one hand we cannot distribute recaptured visas entirely according to the statutory preference scheme because such a distribution would ignore the realities of the allocation that would have taken place in 1977. On the other hand, we cannot distribute the recaptured visas only to nonpreference aliens who have priority dates before October 1, 1977, because surely some preference petitions were outstanding as of that date. Thus defendants argue that preference aliens and nonpreference aliens have conflicting interests in the allocation of any recaptured visas.

Defendants argue that Class II, composed of aliens who would be within sixty days of receiving visas absent defendants' unlawful charging policy, should not be certified because the class as plaintiffs have defined it would not necessarily be entitled to relief from deportation under the federal regulations. Moreover, defendants contend that at this time we cannot determine who the members of Class II are. Finally, defendants perceive potential conflict of interest among members of Class III and urge us not to certify it.

Plaintiffs answer the standing argument by asserting that nonresident aliens do have standing to challenge governmental action which has been "committed to agency discretion" under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702. Furthermore, plaintiffs contend that the issue of nonresident alien standing is irrelevant here, because if we direct defendants to distribute withheld visas, any distribution must follow the statutory scheme as it existed and operated in 1977, and this distribution would necessarily benefit both resident and nonresident aliens regardless of whether they are all members of the class.

Plaintiffs further argue that any conflict of interest is illusory, because very few preference applicants were on the waiting list as of October 1, 1977, and very few of these preference petitions remain unissued today. Therefore, the bulk of the recaptured visas should and would be given to nonpreference aliens. Plaintiffs argue that their definition of Class II follows the definition of aliens

entitled to relief from deportation under the federal regulations, and that no conflict of interest arises among Class III members.

In determining whether to certify Class I, we initially note that defendants have not questioned, nor do we, that this class is so numerous as to preclude joinder and that questions of law or fact are common to the class. *See* F.R.C.P. 23(a)(1)-(2).

We also hold that nonresident aliens have standing to challenge the defendants' interpretation of the 1976 Amendments. Nonresident aliens deprived of visas by defendants' actions have certainly suffered the "injury in fact" required by the Constitution. *See, e.g., Association of Data Processing v. Camp*, 397 U.S. 150, 152 (1970). Courts have recognized that the general rule that nonresident aliens have no standing to sue in United States courts, *see e.g. Johnson v. Eisentrager*, 339 U.S. 763 (1950), does not apply if a specific statutory scheme permits suits by nonaliens injured by the operation of the statute. *See Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976). Congress clearly intended the visa distribution system to apply to United States residents and nonresidents. Nonresidents and residents are equally "aggrieved by agency action" in this case within the meaning of §10 of the Administrative Procedure Act, which provides that

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review.

5 U.S.C. § 702. Both residents and nonresidents are thus "arguably within the zone of interests to be protected or regulated by the statute." *Assoc. of Data Processing v. Camp, supra* at 153. *See Estrada v. Ahrens*, 296 F.2d 690, 695 (5th Cir. 1961); *Jaimez-Revolla v. Bell, Attorney General*, ... F.2d ..... (D.C. Cir., No. 77-1949, March 27, 1979).

Some courts have held that administrative decisions affecting immigration are not reviewable. *See Cobb v.*

Murrell, 386 F.2d 947 (5th Cir. 1967); *Rumaharbo v. Sec'y of Labor*, 390 F. Supp. 208 (D.C.C. 1975). The legislative history of the Immigration and Nationality Act indicates, however, that the duty to allocate visas up to the limit of the quotas, unlike the administrative decisions involved in the cited cases, is not "committed to agency discretion" under § 10 of the Administrative Procedure Act so as to preclude judicial review. *See* Hearings on H.R. 2590 Before Subcomm. No. 1 of the H. Comm. on the Judiciary, 89th Cong., 1st Sess., Ser. 7, 35 (1965); S. Rep. No. 748, 89th Cong., 1st Sess., U.S. Code Cong. & Ad. News 3328, 3338 (1965). Thus we hold that both residents and nonresidents have suffered identical injury as a result of agency action, and both groups have standing to sue.

We now turn to the remaining class certification issues of whether the representative parties' claims are typical of the class claims under Rule 23(a)(3), whether the named plaintiffs will adequately represent the class under Rule 23(a)(4), and whether injunctive or declaratory relief is appropriate with respect to the class as a whole under Rule 23(b)(2).

If we find that the defendants unlawfully withheld visas during 1977, these visas should have been distributed between January 1, 1977 and October 1, 1977. Therefore the visas should now be distributed to those visa applicants who would have received them in 1977. This distribution would not be possible, however, because many applicants who would have received one of the recaptured visas have since been issued visas. Because the withheld visas were not issued in fiscal 1977, preference applicants who had established their entitlement to preference status before October 1, 1977 had to wait until 1978 or 1979 to receive their visas. This meant that fewer visas were available in 1978 and 1979 for preference applicants with later priority dates.

Three possible fact situations illustrate the form that relief might take. If the demand for preference applications had been great enough in the last nine months of

1977 to absorb all of the visas that should have been issued, then we would take the displacement effect caused by the shifting waiting list into account and order the visas distributed according to the statutory preference scheme. Although this would have the result of issuing visas to applicants who were not on the waiting list as of October 1, 1977, the recipients of the recaptured visas would be the persons who would now be suffering injury from the defendants' unlawful interpretation of the statute.

The second possibility is that demand for preference status visas was not great enough during the first nine months of 1977 to absorb the additional visas. If all preference applicants who had submitted applications during 1977 had been issued visas in 1977, then all of the additional visas would have gone to nonpreference applicants. Thus, if there were enough nonpreference applicants with 1977 or before priority dates, then the entire lot of recaptured visas would be allocated to nonpreference aliens.

Unfortunately, however, we apparently do not have a situation here as simple as either of the first two. Instead we have a third situation somewhere in between. Some preference applicants did remain on the waiting list as of October 1, 1977. Thus had the defendants issued more visas during 1977, some or all of these applicants would have received visas during fiscal 1977. Then the displacement effect would have come into play, and all preference applicants now on the waiting list would be higher on the list and closer to receiving a visa. Nonpreference applicants would have received the visas remaining from the recaptured visas after the preference demand was satisfied.

Thus, under the facts as both defendants and plaintiffs have alleged them, any recaptured visas would go to both nonpreference and preference applicants. Consequently, both groups are competing for a limited number of visas, and each group would be benefitted by a reduction in the relief granted to the other. Any proposed scheme for distribution of recaptured visas

would depend upon proof of the number of preference and nonpreference applicants who were on the waiting list as of October 1, 1977 and whether all preference applicants as of that date would have received visas during 1977 if the defendants had issued recaptured visas during that year.[5] Thus insofar as relief is concerned, these groups have conflicting interests which preclude certification. *See* Rules 23(a)(3) and (4); 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1768 at 647; *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443 (D. Ga. 1975), *appeal dismissed*, 557 F.2d 1218 (5th Cir. 1977).

Nevertheless all current visa applicants have been injured by defendants' interpretation of the statute, and all visa applicants have an identical interest in the action's central issue of whether the defendants lawfully interpreted the statute. *See DuPree v. E. J. Brach & Sons, Division of American Home Products Assoc.*, 77 F.R.D. 3 (N.D. Ill. 1977). Both preference and nonpreference aliens have a coextensive interest in seeking to recapture the maximum possible visas for Mexican aliens. Thus no conflict exists for the purpose of determining the merits of this case, namely a determination of whether defendants properly applied the statute. Therefore we will choose the option exercised by many courts in class actions by certifying a class for the purpose of adjudicating the liability issues in the case. *See Frankel v. Wyllie and Thornhill, Inc.*, 55 F.R.D. 330, 334 (W.D. Va. 1972); *Seligson v. Plum Tree, Inc.*, 55 F.R.D. 259, 252 (E.D. Pa. 1972). We will exercise our

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[5] Defendants have stated that all preference applicants as of October 1, 1977 would not have received visas during 1977 because all preference applicants who had not received visas by the end of the year had applied for and received preference status during the last month of fiscal 1977. Because the State Department distributed the quota at a uniform rate from month to month, by September most of the withheld visas would have been issued to nonpreference applicants and few visas would have remained for preference applicants. *See* Garner declaration.

power under 28 U.S.C. § 2201 to issue a declaratory judgment as to defendants' interpretation of the statute. If we decide that the plaintiff class is entitled to any relief, then we can exercise our authority under Rule 23(c)(4)(B) to divide the class into subclasses. We would then await separate representation of the conflicting subclasses of preference and nonpreference applicants to determine how the recaptured visas should be distributed.

Accordingly we now certify a class consisting of all current Mexican visa applicants, including both preference and nonpreference applicants, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to preference status on the basis of such familial relationships.[6] The certification is only for the purpose of determining whether the defendants correctly interpreted the 1976 Amendments.

We need not consider certification of plaintiffs' proposed Class III, inasmuch as we have included all members of Class III in the class we have certified for the liability issues. Plaintiffs' motion for certification of Class II, consisting of those aliens who are within sixty days of having a visa available to them is denied without prejudice because we cannot determine with specificity the parameters of the class, nor could we afford it any relief until we have determined if and how any additional visas are to be distributed.

Cross Motions for Summary Judgment

Plaintiffs contend that defendants' interpretation of the 1976 Amendments is unlawful. According to plaintiffs, no visas issued during 1976 should have been

[6] These relatives have standing to challenge unlawful application of the immigration laws by virtue of the injury resulting from separation from family. *Cf. Fiallo v. Levi*, 406 F. Supp. 162, 165 (E.D.N.Y. 1975); *Faustino v. INS*, 302 F. Supp. 212 (S.D.N.Y. 1969).

charged against the 20,000 per country quota because the quota did not become effective until January 1, 1977. Plaintiffs argue that defendants' interpretation of the Amendment resulted in a retroactive application. Consequently the 14,203 visas issued between October 1 and December 31, 1976 charged to the Mexican 20,000 quota were improperly charged and should have been available to Mexican immigrants during the first nine months of 1977. Moreover, plaintiffs argue, defendants cannot now justify the issuance of only 5,435 visas on the basis of the 120,000 hemisphere quota, because only 106,634 Western Hemisphere visas were issued during fiscal 1977. Thus plaintiffs seek to recapture the remainder of the 1977 hemispheric quota, 13,366, to be issued to Mexican immigrants.[7]

For their part defendants contend that their interpretation of the statute is a reasonable one which we should not disturb. They argue that the 1976 Amendments are ambiguous because they do not indicate how the 20,000 per country quota was to be allocated in the transition year, fiscal 1977. They note three possible resolutions of the ambiguity. Pursuant to the first resolution, plaintiffs' interpretation, the State Department would have begun charging visas to the Mexican quota on the effective date of the statute, January 1, and the full 20,000 quota would have been allocated during the last nine months of fiscal 1977. Under the second interpretation, the State Department upon the effective date of the statute would have distributed the 20,000 per country visas pro rata over the remainder of fiscal 1977. Then

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[7] Plaintiffs also contend that defendants' interpretation of the statute violated their due process rights. We need not reach this issue, because if defendants applied the statute incorrectly, we have the power to order them to correct their unlawful act. *See* 8 U.S.C. § 1329; 28 U.S.C. § 1361; *Silva v. Bell.* 76 C 4268 (N.D. Ill., unpublished order, October 10, 1978). If defendants' interpretation and application of the statute were correct, then plaintiffs' due process argument disappears.

the State Department could have issued 15,000 Mexican visas during the last three-fourths of fiscal 1977.

The final interpretation is the one the defendants used. Finding the Congressional intent clear to limit the number of immigrants from a particular country to 20,000 per fiscal year, defendants implemented that policy within the confines imposed by the 1976 Amendments. Because only three-fourths of fiscal 1977 remained when the preference system became effective, and because the State Department had issued visas during the beginning of fiscal 1977 pursuant to the 1965 Amendments, defendants could implement the 20,000 per fiscal year limit only by charging the visas issued during the last three months of calendar 1976 against the 20,000 quota as nonpreference visas.

Defendants draw support for this interpretation from § 9(b) of the 1976 Amendments, Pub. L. No. 94-571, 90 Stat. 2703, 2707, which provides that any immigrant who had a priority date issued pursuant to the 1965 Amendments before the effective date of the 1976 Amendments is entitled to immigrant status under § 1153(a)(8), the nonpreference category. They relied on § 9(b) and the Congressional intent to limit immigration to 20,000 per country for any fiscal year to resolve the ambiguity in the statute created by the disparity between the statute's effective date and the beginning of the fiscal year.

Defendants argue that their implementation of the statute was not retroactive inasmuch as the procedure for issuing visas in 1976 was not in any way governed by or subject to the requirements imposed by the 1976 Amendments. Rather, the State Department only counted the visas that had been issued in 1976 to determine how many visas remained for issuance in the last nine months of fiscal 1977.

We should not disturb defendants' implementation of the statute unless their interpretation is an unreasonable one or contrary to congressional intent. *See Nazareno v. Attorney General*, 512 F.2d 936, 940 (D.C.

Cir.), *cert. denied*, 423 U.S. 832 (1975). For several reasons, however, we find defendants' interpretation of the 1976 Amendments to the Immigration and Naturality Act to be both unreasonable and contrary to Congress' intent.

First, although defendants admit that the 14,203 Mexican visas issued between October 1 and December 31, 1976 were not issued pursuant to the 1976 Amendments' preference system, these 14,203 visas were nevertheless applied to the quota of 20,000 Mexican visas per fiscal year. This application was directly contrary to Congressional intent as we discern it. The section of the 1976 Amendments which establishes the 20,000 quota, codified at 8 U.S.C. § 1152, provides that

> [T]he total number of immigrant visas and the number of conditional entries *made available to natives of any single foreign state under paragraphs (1) through (8) of section 1153(a) of this title* shall not exceed 20,000 in any fiscal year. (emphasis added).

Thus, by the express language of the Act the quota applies only to those visas made available under the preference system, which was applied to Western Hemisphere immigrants for the first time on January 1, 1977. Defendants concede that the permanent visas issued from October 1 through December 31, 1976 were not issued pursuant to the preference system. We see no basis for arguing that any of those October through December 1976 visas were "made available" under the preference categories contained in 8 U.S.C. § 1153(a)(1)-(8).

Moreover, although defendants contend that §9(b) of the 1976 Amendments provides authority for treating the late calendar 1976 visas as eighth preference visas, we do not understand how defendants take comfort from the section. Section 9(b) provides that

> An alien chargeable to the numerical limitation contained in section 21(e) of the Act of October 3, 1965 [the 120,000 hemispheric quota] who established a priority date at a consular office on the

> basis of entitlement to immigrant status under statutory or regulatory provisions in existence on the day before the effective date of this act shall be deemed to be entitled to immigrant status under section 203(a)(8) of the Immigration and Naturality Act [codified at 8 U.S.C. § 1153(a)(8)] and shall be accorded the priority date previously established by him. Nothing in this section shall be construed to preclude the acquisition by such an alien of a preference status under section 203(a) of the Immigration and Naturality Act.

As we read this section, it merely categorizes those immigrants who had satisfied the requirements under the 1965 Amendments for obtaining a visa but had not yet applied for preference status. Section 9(b) allows these immigrants to retain their priority date but requires them to be processed through the statutory preference scheme. The section cautions that the treatment of special status applicants as nonpreference applicants in no way limited their rights to obtain preference status with the same priority date. The provision thus allows these immigrants to retain their place on the waiting list and indicates which preference will be applicable. Section 9(b) is necessary to provide a route through the preference system by which these immigrants could obtain visas after January 1, 1977 and to avoid the need for reapplication. This purpose is inapplicable to immigrants who already have received visas, and the statute makes no mention of immigrants who are already permanent residents. Accordingly, we see no basis for defendants' reliance on § 9(b) as a justification for treating the October—December, 1976 visas as eighth preference visas for the purpose of charging them to the fiscal 1977 quota.

Furthermore, although the Congressional intent to limit immigration to 20,000 persons per country for each fiscal year is obvious, we do not agree that this Congressional intent has any relationship to or bearing upon the period prior to January 1, 1977. Inasmuch as the statute was not effective until that date, Congress's

intention to limit immigration to 20,000 per country also had no effect until that date. Regardless of whether fiscal year 1977 coincided with the effective date of the statute, to apply the 20,000 quota to any period prior to the effective date of the statute is a retroactive application without basis in Congressional intent. *See In re Higginbotham*, 430 F.2d 155 (7th Cir. 1970).

The conclusion that defendants have erred does not, however, mandate that plaintiffs' interpretation of the statute is correct. Under plaintiffs' theory, the government would be required, given adequate demand, to issue 20,000 Mexican visas between the effective date of the statute and the end of the fiscal year, regardless of the length of that period. We cannot accept this proposition. Congress clearly intended a specific limit to apply to immigration from the Western Hemisphere, and the statute was meant to conform the Western Hemisphere limits. The House Report to the 1976 Amendments notes that "the proposed legislation rejects the concept of a 'special relationship' between this country and certain other countries as a basis for immigration law, in favor of a uniform treatment for all countries." H. Rep. No. 94-1553, 94th Cong., 2d Sess., U.S. Code Cong. & Ad. News 6073, 6081. Prior to the establishment of the 20,000 per country quota, Mexican immigrants composed between 35,000 and 45,000 of the 120,000 hemispheric quota. *See* Arias declaration, Defendants' exhibit 1. If we were to interpret the statute to allow 20,000 Mexican visas to be issued during the first nine months of 1977, then a "special relationship" would indeed exist for Mexico, and Mexican immigration would proceed at a pace not enjoyed by any Eastern Hemisphere's country's immigrants.

Furthermore, § 201(a) of the 1976 Amendments provided that the issuance of visas to Western Hemisphere immigrants could not exceed 32,000 in any of the first three quarters of the fiscal year.[8] Pub. L. No. 94-571, 90

[8] The current statute, which does not distinguish between Eastern and Western Hemisphere immigrants, establishes a limit of 77,000 in any of the first three quarters. *See* 8 U.S.C. § 1151(a).

Stat. 2703. Thus Congress intended the hemispheric quota to be distributed uniformly over the course of the year, and a holding that required the State Department to crowd the full per country quota of Mexico into three quarters of the fiscal year would disrupt this uniformity. We therefore believe that Congress did not intend immigration for the first nine months of the statute's life to proceed at a rate higher than in subsequent years. Thus we hold that the most reasonable approach is to apply the 20,000 quota pro rata to the last three-fourths of fiscal 1977. Under this interpretation defendants could have issued 15,000 Mexican visas, or 9,565 more than were issued.

Therefore we hold that the plaintiff class is entitled to a declaratory judgment to the effect that defendants should have issued an additional 9,565 visas to Mexican immigrants. We add here our tentative conclusions as to the form that further relief will take. These conclusions are subject to change upon additional submissions of data by the parties and separate representation of subclasses. We conclude that the 9,565 visas should be distributed to two subclasses. The class we have certified thus should be divided into two subclasses under Rule 23(c)(4)(B), the first subclass consisting of all current preference applicants and the other consisting of nonpreference applicants as of October 1, 1977.[9] We cannot yet conclude that the number of preference applicants as of October 1, 1977 should dictate the number of recaptured visas that the class of preference applicants should receive, because the government contends that most of the preference applicants as of that date had established their preference status during the last month of fiscal 1977. Therefore, because the

[9] The government has noted that it would like an opportunity to challenge the typicality and adequacy of representation under Rule 23(a)(3) and (4) of the named plaintiffs in the amended complaint. They will now have an opportunity to challenge the named plaintiffs as representatives of these subclasses.

State Department issued visas at a uniform rate, the State Department would not have had enough visas remaining by the last month to satisfy the preference demand arising during September, 1977 even if an additional 9,565 visas had been issued. Moreover, the figures that the parties have given us are not exact. We do not know how many preference applicants were on the list as of October 1, 1977,[10] nor how many nonpreference applicants there were on that date. Furthermore, we must have specific data as to when the preference applicants that were outstanding as of October 1 were submitted in order to determine how the visas would have been distributed had the State Department issued them in 1977. Consequently we cannot yet make even tentative conclusions as to how the visas should be allocated between the two subclasses. The two subclasses must have separate representation so that their interest in receiving as many visas as possible will be protected.

Plaintiffs' motion for class certification is granted for liability issues and a class is certified consisting of all current Mexican visa applicants, including both preference and nonpreference applicants, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to preference status on the basis of such familial relationships. Plaintiffs' motion for summary judgment is granted in part in accord with the views herein expressed. Defendants' motion for summary

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[10] This figure should not include all preference applicants who have priority dates prior to October 1, 1977, because many of these applicants may have established their priority dates under the 1965 Amendments and then retained the dates upon receiving preference status under the 1976 Amendments. If they obtained preference status after October 1, 1977, they would not have been on the waiting list as of October 1, 1977, even though their priority dates are from before that date.

judgment is denied. Cause is set for report on status June 11, 1979 at 9:30 a.m.

ENTERED:

/s/ PRENTICE H. MARSHALL
United States District Judge

DATED: May 18, 1979.

APPENDIX "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IMELDA CONTRERAS DE AVILA, et al.,

Plaintiffs,

No. 78 C 1166 *v.*

GRIFFIN B. BELL, et al.,

Defendants.

MEMORANDUM DECISION

In this class action for injunctive and declaratory relief, plaintiffs, who are Mexican visa applicants and their United States citizen or permanent resident sponsors, sought recapture of visas allegedly incorrectly charged to the yearly quota for Mexico in fiscal year 1977. In our memorandum decision of May 18, 1979, we held that the State Department had interpreted the 1976 Amendments to the Immigration and Nationality Act incorrectly and that 9,565 additional visas should be awarded to Mexican immigrants. We certified a class for liability issues but held that the class had to be divided into subclasses, with separate counsel, before we could grant relief. On September 17, 1979 we certified two subclasses, and on December 21, 1979 and on January 18, 1980, we entered a temporary restraining order and a modified temporary restraining order enjoining the Immigration and Naturalization Service (INS) from deporting certain immigrants who may be entitled to recapture visas. We are now prepared to rule on plaintiffs' motion for final judgment and permanent injunctive relief.

DISTRIBUTION OF RECAPTURED VISAS

The 1976 Amendments established a per country quota of 20,000 permanent resident visas per fiscal year. 8 U.S.C. § 1152. Although the fiscal year begins on October 1, and the 1976 Amendments did not become effective until January 1, 1977, the State Department charged visas awarded between October 1, 1976 and January 1, 1977 against the fiscal 1977 quota. We held that the State Department should not have begun charging visas against the per country quota until January 1, 1977, the effective date of the 1976 Amendments, and that the quota should have been applied pro rata to the three-fourths of fiscal 1977 remaining after the effective date of the statute. Thus 15,000 visas, or 9,565 additional visas, should have been issued to Mexican immigrants between January 1, 1977 and September 30, 1977.

The 1976 Amendments established a preference scheme for distributing the per country quota. 8 U.S.C. § 1153(a). Each of the preference categories is allocated a percentage of the per country quota. An eighth category, the "nonpreference" category, is allocated only the residual visas not actually issued to the seven preference groups. We determined that applicants for preference visas and applicants for nonpreference visas had conflicting interests in the allocation of the recaptured visas. The separate counsel for these two groups and the government have submitted separate plans for the distribution of the 9,565 recaptured visas.

Because the preference system was not in full swing for most of fiscal 1977, a considerable time elapsed before the demand for preference category visas equalled the quantity available. Therefore, because the State Department allocates the quota uniformly from month to month, most of the recaptured visas would have gone to nonpreference applicants. The government and both subclasses have agreed that 8,496 visas should be issued to nonpreference subclass members in strict chronological order by priority date. The parties disagree, however, as to the proper distribution of the 1,069 remaining visas to the preference class.

The government argues that the full 1,069 visas should not be distributed. The State Department makes visa numbers available to consular offices in a monthly allocation. If the visa numbers allocated do not result in the actual issuance of visas and so remain unused in that month, they must be returned to the State Department for redistribution in later months. The numbers issued for a particular month often do not lead to an equal number of issuances, because some applicants on the waiting list either do not appear for their final interview or are found ineligible at the interview. If the numbers allocated during September, the last month of the fiscal year, are not used, they cannot be used in subsequent months. Thus the full 20,000 quota is not reached in many fiscal years. *See* Declaration of Franklin H. Baker. Because the only preference demand left unsatisfied in fiscal 1977 arose during September, defendants contend that many of the 1,069 numbers allocated to preference applicants during 1977 would have remained unissued.

The first of the preference categories with unsatisfied demand in fiscal 1977 were the second category, with 872 applicants on the waiting list, and the fourth category, with 225 applicants. Taking the rate of unused numbers from September, 1977 through December, 1977, the government found a 55% rate for second preference and 49% for fourth preference. Therefore, the defendants contend that only 392 visas, or 45% of the second preference waiting list, should now be reissued to second preference applicants. As for the fourth preference applicants, defendants note that all of the fourth preference demand was satisfied in fiscal 1978. Therefore, no current fourth preference applicants are now suffering the ill effects of defendants' charging policy. Thus the 115 visas (51% of 225) that would have been issued in 1977 should be subject to the "fall down" effect of the preference system and be allocated to lower preference categories. Although the government believes that these 115 visas should go to fifth preference applicants, defendants assert that further study must precede a conclusion that fifth preference

applicants are the current victims of the State Department's failure to issue the 115 visas to fourth preference applicants.

The nonpreference class proposes a different scheme. They contend that all 9,565 visas should be redistributed, regardless of the failure rate offered by the defendants. The nonpreference plaintiffs presume that the State Department would have overallocated visa numbers in order to approach the 20,000 quota. This overallocation would have been based on the failure rate or the unused number rate, which the nonpreference plaintiffs say should be derived only from the failure rate for September, 1977. The failure rate in September, 1977 was 39%. Thus to issue 1,069 visas with a 39% failure rate the State Department would have had to issue 1,752 visas numbers. Given the September, 1977 preference demand, the 1,752 visa numbers would have been allocated as indicated in the first column of the following table, with the 61% success rate in the second column:

	Numbers Allocated	*Visas Issued*
First preference	0 (no demand)	0
Second preference	872 (total demand)	532
Third preference	0 (no demand)	0
Fourth preference	225 (total demand)	137
Fifth preference	209 (total demand)	127
Sixth preference	18 (total demand)	11
Seventh preference	0 (no demand)	0
Nonpreference group	428 (remainder of 1,752)	262

Then, the nonpreference plaintiffs look at fiscal 1978 processing. According to these plaintiffs, no demand for first, third, fourth, fifth, sixth, and seventh preference existed in October, 1978. Thus the nonpreference applicants claim that no applicants in any of these groups are now suffering injury as a result of the unlawful charging policy, and any visas that would have been unused by these groups in 1977 would have dropped

down to the nonpreference category. Thus of the 1,069 visas, 532 would be allocated to second preference applicants and 567 would be issued to nonpreference applicants.

The preference plaintiffs also assert that all 1,069 visas should be issued. The preference class argues, however, that all of the 1,069 visas should be issued to preference applicants. These plaintiffs state that 872 visas, the extent of the second preference demand in September, 1977, should be issued to applicants from that category. The remaining 197 visas should be issued to fifth preference applicants, because the number of visas allocated to fourth preference applicants, the category for which demand existed in September, 1977, satisfied the demand for fourth preference visas in fiscal 1978. If, however, we choose to apply a failure rate, the preference plaintiffs argue that we should apply a 20% failure rate rather than either the 39% rate proposed by nonpreference plaintiffs or the 55% and 49% rates proposed by the government.

Our goal in affording relief is to place the class members in the position they would be in absent the illegal charging policy. *Silva v. Bell*, 605 F.2d 978, 985 (7th Cir. 1979). Given the nature of the visa distribution process, however we can only reach a rough approximation of this goal. The parties have reached their own approximation with respect to nonpreference visas, agreeing that 8,496 visas would have been originally issued to nonpreference applicants. But we have no practicable way of determining with certainty how the remaining 1,069 visas would have been distributed. Therefore we must make certain assumptions in order to approximate the distribution as it would have taken place.

One assumption we decline to accept, however, is the government's assertion that because of the percentage of numbers which would have been issued but not used, not all 1,069 visas would have been actually used. In *Silva v. Bell, supra*, the State Department was ordered to redistribute all Cuban visas, which had incorrectly been

charged to the 120,000 Western Hemisphere quota. No reduction in recaptured visas was made simply because the 120,000 quota would not have been completely used in any of the years at issue. Moreover, the INS official responsible for allocating visa numbers during 1977 has stated that he designed his allocations to insure that Mexico reached or came close to its 20,000 annual visa limit, that he regularly overallocated numbers to Mexican posts because he was aware of the return rate, and that his practice of overallocating to Mexico carried over into September, 1977. Declaration of Franklin H. Baker, ¶¶5, 7, 8.[1] We see no reason why we should not now frame relief for the injured class members so as to achieve the State Department's desired goal of using the full 20,000 quota. Inasmuch as we cannot be certain how close the defendants would have come to issuing 20,000 visas in fiscal 1977, we believe that our equitable powers enable us to favor the injured class by structuring relief so as to exhaust the full quota.

We do agree, however, with the nonpreference plaintiffs and the defendants that to distribute the visas as they would have been distributed during 1977, we must take into account the percentage of allocated visa numbers that would not have been used. This is not inconsistent with our holding that the distribution of recaptured visas should reach a full quota, because we can presume that the unused visa numbers would constitute the overallocation of numbers necessary to reach the quota. Neither the nonpreference plaintiffs' figures

[1] Although Mr. Baker states that he overallocated the visas so as to reach the 20,000 quota, he states that he would have allocated only 1,100 visas to preference applicants in September, 1977. This allocation would certainly not be enough to result in the issuance of 1,069 visas. It is possible that the 1,100 visa numbers, when combined with the numbers necessary to result in the issuance of 8,500 nonpreference visas, would constitute a significant overallocation. Even if this is the case, Mr. Baker's attempt to overallocate to reach the quota would have fallen short of the mark. As we will demonstrate, *infra*, ours will not.

nor the defendants' figures are based on particularly reliable data, however. The percentage that would be relevant in determining the failure rate would be derived from the failure rate of those applicants who would have received final interviews in September, 1977 if the State Department had issued 1,069 additional visas. But these applicants did not receive interviews in September, 1977, so the nonpreference plaintiffs' figures based on actual September, 1977 issuances is not accurate. Moreover, some of the preference applicants who would have received interviews in September, 1977 did not have their interviews or receive visas until after January 1, 1978. Thus the government's percentage, based on the September, 1977 - December, 1977 figures, uses data from a month, September, when no visas or interviews were given to the relevant applicants, and does not use data from months, such as January, 1978, when some visas were issued to those applicants.[2]

The figures do, however, give us a general idea of what the failure rate would have been. They are more persuasive than the 20% figure urged by the preference plaintiffs. Their only support for this figure seems to be that it will benefit them more than the other proposed figures. Because we have no more reliable figures than those proposed by the nonpreference plaintiffs and the government, we will take those figures into account and adopt the figure of 40% as our rough approximation of what the unused number rate would have been.

Because we have assumed for the purposes of shaping relief that the State Department would have allocated enough visas to compensate for the failure rate, we must make our calculations assuming a 40% rate. Making this assumption, the State Department would have issued 1,781 visa numbers for September, 1977 as follows:

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[2] Moreover, the government figures measure only second and fourth preference visa issuances. But, assuming an overallocation, some of the visas issued during September, 1977 would have been issued to other preference categories.

	Number
First preference	0 (no demand)[3]
Second preference	872 (total demand)[4]
Third preference	0 (no demand)[5]
Fourth preference	225 (total demand)[6]
Fifth preference	209 (total demand)[7]
Sixth preference	18 (total demand)[8]
Seventh preference	0 (no demand)[9]
Nonpreference group	452 (remainder)

Assuming a 60% success rate, this allocation would have resulted in the following issuance of visas:

	Number
Second preference	524
Fourth preference	135
Fifth preference	126
Sixth preference	12
Nonpreference group	272

We must then examine the visa allocation in fiscal 1978. If the processing of a particular preference group became current during 1978, so that no members remained on the waiting list, then any applicant who

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[3] *See* Baker Declaration.

[4] *Id.* ¶9.

[5] *Id.* ¶10.

[6] *Id.* ¶11. Although Mr. Baker indicates that this 225 figure includes an overallocation, there would be no point in allocating visas to a preference category beyond the current demand for that category. Thus we will assume that the demand for the fourth preference category was 225 in September, 1977. Because of the "fall down" effect discussed *infra*, this assumption will not have any effect on the actual distribution of visas.

[7] See forms FS-469, Visa Number Demand, Exhibit C to Nonpreference Plaintiffs' Reply Memorandum.

[8] *Id.*

[9] *Id.*

was later placed on the waiting list would not have his application delayed by the unlawful charging policy, and thus no members now currently on the preference waiting list for that category would be suffering injury. The only preference category that was not current by October, 1978 was the second preference category. *See* U.S. Department of State Visa Bulletin for October, 1978, Nonpreference Plaintiffs' Exhibit D to Reply Memorandum. Thus 524 visas should now be redistributed to second preference applicants. The remaining 273 visas that would have gone to preference applicants in September, 1977 should fall down to the nonpreference category, in addition to the 272 visas that would have gone to the nonpreference category as a result of the failure rate in September, 1977.

Therefore, the State Department should distribute 524 visas to second preference applicants and 9,041 visas to nonpreference applicants in accordance with the Final Judgment Order entered herein.

INJUNCTIVE RELIEF

On December 21, 1979 we entered a temporary restraining order, which we modified on January 18, 1980. The temporary restraining order enjoins the INS from deporting any Mexican immigrant who has a second preference priority date earlier than April 1, 1978 or a nonpreference priority date earlier than July 1, 1976. The plaintiffs have moved for a permanent injunction to this effect which would protect the immigrants for the duration of the distribution process. The government urges us not to award any permanent injunctive relief, and if we do, defendants have several criticisms of the plaintiff's proposed injunction.

The government contends that the proposed injunction is improper because it would benefit more immigrants than would stand to gain from the distribution of the recaptured visas. Defendants note that there are presently over 130,000 nonpreference applicants on the waiting list. Defendants also argue that the injunction would

conflict with a similar injunction entered in the *Silva* case. Finally, the government contends that the immigrants to be protected by the injunction, who are in the country illegally, have unclean hands and so are not entitled to relief.

None of these criticisms are persuasive. First, the injunction would not be overbroad, because the 130,000 waiting list is made up of aliens who are still in Mexico, as well as those who are in the United States. Moreover, more than the first ten to twenty thousand members of the waiting list must be protected, because many of the nonpreference applicants on the waiting list are entitled to relief under the *Silva* case. Second, because the injunction here is similar to the one entered in *Silva*, and because the cut-off date for priority dates of nonpreference applicants is later in plaintiffs' proposed injunction than the date the *Silva* court used, we cannot see how the proposed injunction conflicts with the *Silva* injunction. Finally, defendants' unclean hands argument is inapposite given the INS policy of extending relief from deportation to those who are close to receiving a visa. *See* 8 C.F.R. § 245.5. Absent the defendants' unlawful charging policy, many of the immigrants protected by the injunction would now have visas. Therefore, we conclude that the plaintiffs are entitled to a permanent injunction.

We have entered, with modifications, the injunction the plaintiffs seek. We add only a few comments here with respect to the criticisms defendants have made. The government, in a supplemental memorandum, has proposed as a cut-off for priority dates July 1, 1973 rather than the July 1, 1976 date for nonpreference applicants now in effect in the temporary restraining order. As plaintiffs note, however, protecting only the 19,000 immigrants with pre-July 1, 1973 dates is clearly insufficient, because many of these 19,000 are entitled to, and will receive, visas as part of the *Silva* distribution. Therefore, the July 1, 1976 date will stand.

We have incorporated the defendants' suggestion that only immigrants entering the country prior to December 14, 1979 are protected.

The government also challenges the work authorization paragraph in plaintiffs' proposed injunction. This provision is identical to the provision contained in the *Silva* injunction. Although liability was not at issue in *Silva*, and although the Court of Appeals may ultimately determine that the class protected by the injunction is not entitled to relief, we believe that work authorization is necessary to prevent further injury to immigrants who have been injured by what we have held to be an unlawful charging policy.[10] The authorization will date back to the last date the immigrant entered the country.

The government has also criticized other provisions of the proposed injunction which are identical to provisions in the *Silva* injunction. *See* Proposed Permanent Injunction, ¶¶3, 4, 7, Defendants' Memorandum in Response, 18-22. The government has not submitted anything which persuasively or conclusively indicates that these provisions, as used in *Silva*, have posed difficulties in administration or implementation. Therefore, we see no reason why these provisions should not be part of the injunction in the instant case.

Finally, we agree with the government that with respect to the second preference immigrants, once the INS has identified by name the likely beneficiaries of the distribution process, the injunction should protect only those named applicants. In identifying the second preference applicants likely to obtain relief, the INS should make substantial allowance for the probability that many of the numbers issued to applicants on the waiting list will not actually result in the issuance of visas. The INS in making this allowance should use at least a 40% rate, the failure rate we used here.

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[10] For the same reasons that the injunctive relief as a whole is not overbroad, this provision regarding employment authorization is not overbroad.

Final judgment and a permanent injunction will enter.

ENTER:

/s/ Prentice H. Marshall
United States District Judge

DATED: February 27, 1980.

APPENDIX "D"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CONTRERAS DE AVILA, et al.,

Plaintiffs,

No. 78 C 1166 *v.*

GRIFFIN B. BELL, et al.,

Defendants.

PERMANENT INJUNCTION

This cause having come before the Court, and it appearing from the record that members of plaintiffs' class will suffer separation from their families, loss of employment, and expulsion from the United States by defendants' actions:

It is hereby ORDERED, ADJUDGED and DECREED:

1. Except as specifically provided in this order, any Mexican second preference immigrant visa applicant who entered the country prior to December 14, 1979 and who is known by the Immigration and Naturalization Service (hereinafter "INS") to have a priority date earlier than April 1, 1978, and any Mexican non-preference immigrant visa applicant who entered the country prior to December 14, 1979 and who is known by the INS to have a priority date earlier than July 1, 1976, shall be permitted by the INS to remain in the United States, and the INS shall not begin, continue or conclude any effort to expel such an alien. The prohibited efforts include, but are not limited to, detention, requiring the posting of bond, issuing orders to show cause, holding deportation hearings, entering deportation orders, terminating voluntary departure, issuing warrants of deportation, failing to cancel orders

and warrants of deportation previously issued, denying stays of deportation, and issuing bag and baggage letters (Form I-166) and voluntary departure letters (Form I-210). With respect to second preference immigrants, once the INS has identified by name the likely beneficiaries of the recapture program, with a substantial allowance of at least 40% for unused visa numbers, this injunction shall apply only to those named beneficiaries.

2. Any alien known to the INS to be a native of Mexico and not a United States citizen or a lawful permanent resident of the United States who hereafter has contact with the INS shall be informed by the INS in writing that such person may have rights under this order.

3. The INS may begin, continue or conclude any effort to expel an alien otherwise protected by this order, including the taking of any of the efforts specifically mentioned in paragraph 1, if:

(a) the regional commissioner or acting regional commissioner personally concludes that the alien's continued presence in the United States would be contrary to the national interest or security, in which case that official shall set forth in writing all his reasons for reaching that conclusion; or

(b) the regional commissioner or acting regional commissioner personally concludes, after due consideration of possible waivers of grounds of excludability and of permission to reapply for admission pursuant to Section 212(a)(16) and (17) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(16) and (17), that an alien is clearly not eligible for an immigrant visa under Section 212(a)(15), (16), (17) or (19) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(15), (16), (17) or (19), in which case that official shall set forth in writing all his reasons for reaching that conclusion and shall give the alien a minimum of seven days' notice before the INS proceeds with any effort to expel the alien; or

(c) the District Director, Acting District Director or Deputy District Director personally concludes, after due consideration of possible waivers of grounds of excludability, that the alien is clearly not eligible for an immigrant visa on any grounds other than those specified in subparagraphs (a) and (b) above, in which case that official shall set forth in writing all his reasons for reaching that conclusion.

4. The Board of Immigration Appeals shall not dismiss an alien's appeal nor sustain an INS appeal in a deportation case in which the record of proceedings clearly shows that the alien is a Mexican second preference immigrant visa applicant with a priority date earlier than April 1, 1978, or a Mexican nonpreference immigrant visa applicant with a priority date earlier than July 1, 1976, unless:

(a) the Board determines, after due consideration of possible waivers of inadmissibility, and of permission to reapply for admission, pursuant to Section 212(a)(16) and (17) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(16) and (17), that the alien is clearly not eligible for an immigrant visa; or

(b) the regional commissioner or acting regional commissioner informs the Board in writing that the alien's continued presence in the United States would be contrary to the national interest or security.

In any case involving a native of Mexico in which the record does not clearly show that the alien has a second preference priority date earlier than April 1, 1978 or a nonpreference priority date earlier than July 1, 1976, the Board may adjudicate the case without restriction, but shall enclose a copy of the following notice in both English and Spanish with its order:

Regardless of the enclosed decision, you may be allowed to stay in the United States because of a recent court ruling if you have a registration date

earlier than April 1, 1978 for a second preference immigrant visa or earlier than July 1, 1976 for a nonpreference immigrant visa. The court ruling relates to the case of *Contreras De Avila v. Bell*, No. 78 C 1166 (N.D. Ill.). Please contact your attorney or authorized representative or an INS office for further information.

5. Nothing in this order shall prevent a deportation hearing from being held, nor a decision from being rendered by a special inquiry officer (Immigration Judge) in any case in which the alien seeks relief under either Section 244(a) or Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1254(a) or § 1255, or seeks any other form of relief from deportation. The enforcement of any resulting decision that may be unfavorable to the alien is subject to the terms of this order.

6. Each person protected from expulsion action by this order shall be granted employment authorization, *nunc pro tunc*, to the date the person entered the United States.

7. The INS shall promptly supply each person who is permitted to remain in the United States pursuant to this order a Form I-94 (Arrival-Departure Record) stamped "*Contreras*: Indefinite authorization to remain. Employment Authorized."

8. The purpose of this Permanent Injunction is to maintain the status quo as to those members of the class earlier certified by this Court who are not clearly ineligible for an immigrant visa. Any determination that an alien is protected or is not protected by this order shall not be binding at the time the alien seeks actual issuance of an immigrant visa or adjustment of status.

9. The INS shall promptly communicate in writing the text of this order to its regional, district and suboffices, which are files control offices or whose officer in charge has authority to issue orders to show cause in deportation proceedings, and to the Board of Immigration Appeals.

10. This Order is entered without requirement that plaintiffs or members of their class post bond or security for costs or damage.

11. This Order may be modified by the Court upon a showing by any of the parties that equity requires such a modification or amendment.

12. This Order will expire upon completion of the recapture program authorized by Final Judgment Order in this action.

ENTER:

/s/ Prentice H. Marshall
United States District Judge

DATED: February 27, 1980.

APPENDIX "E"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IMELDA CONTRERAS DE AVILA, et al.,

Plaintiffs,

No. 78 C 1166 *v.*

GRIFFIN B. BELL, et al.,

Defendants.

AMENDED FINAL JUDGMENT ORDER

By Order of May 18, 1979, a class of all current Mexican visa applicants, including both preference and non-preference applicants, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to preference status on the basis of such familial relationships was certified for liability issues. By the same order, Plaintiffs were granted partial summary judgment on the issue of liability.

On September 17, 1979, 2 subclasses were certified. Subclass 1 consists of all current preference immigrant visa applicants who are natives of Mexico, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to preference status on the basis of such familial relationships. Subclass 2 consists of all current non-preference immigrant visa applicants who are natives of Mexico, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to non-preference status on the basis of such familial relationships.

This matter now comes before the court on plaintiffs' motion for a permanent injunction. Based upon the depositions and declarations of defendants' agents, and upon the previous findings of fact and rulings of law in this cause of action, contained in the Memorandum Decision of May 18, 1979 granting plaintiffs summary judgment on the issue of liability, it is hereby ORDERED, ADJUDGED, and DECREED, that:

A. Defendants shall establish a program for the recapture and reallocation of the 9,565 preference immigrant visa numbers unlawfully assigned to Mexican visa applicants who were issued special immigrant visas during October through December, 1976. Visa numbers shall be allocated under this recapture program in the following manner:

1. Nine thousand forty-one (9,041) visa numbers shall be allocated to the subclass of nonpreference visa applicants. Such applicants shall be considered for recaptured visa numbers in the chronological order of their priority dates, as they qualify for visa or adjustment of status interviews.

2. Five hundred twenty-four (524) recaptured visa numbers shall be allocated to the subclass of preference visa applicants. These 524 visas will be allocated to members of the second preference category.

(a) The recaptured visa numbers shall be allocated in stages. In the first stage, visa numbers shall be made available to those current second preference subclass members who were reported as documentarily qualified to the Visa Service Offices as of July 22, 1977, but who were not issued visas during September, 1977. These applicants shall be considered for recaptured visa numbers in the chronological order of their priority dates as they qualify for visa or adjustment of status interviews.

(b) If it is determined that there is insufficient demand under the first stage of visa number allocation to exhaust the recaptured visa numbers distributed to the second preference category, a second

stage of visa allocation shall be implemented in which unused visa numbers shall be made available to those current second preference visa applicants who were reported as documentarily qualified to the Visa Services Offices as of August 22, 1977, but who were not issued visas during October, 1977. These applicants shall be considered for recaptured visa numbers in the chronological order of their priority dates, as they qualify for visa or adjustment of status interviews. This second stage shall be implemented as soon as it is determined to be necessary for visa allocation, but in no event later than six months after the initiation of visa allocation under the first stage.

(c) If after four months following initiation of the second allocation stage there continues to be insufficient demand to exhaust the recaptured visa numbers distributed to the second preference category under the first or second allocation stages, the second stage allocation procedure shall be repeated for months subsequent to October, 1977, until all of the recaptured visa numbers have been allocated and issued.

(d) The court recognizes the possibility that unavoidable delays in obtaining necessary documents may prevent otherwise eligible second preference applicants from participating in a particular allocation stage. Therefore, once a preference subclass member is eligible to participate in one of the allocation stages, he/she may continue to participate in the recapture program until all recaptured visa numbers available to his/her preference category have been exhausted.

3. All unused recaptured visa numbers to which any second preference or nonpreference category is entitled shall be considered to be immediately available to visa applicants in such categories. The priority date of the first applicant in the second preference and nonpreference category to whom a recaptured visa number is not immediately available shall be published in the

monthly *Visa Bulletin* as a "visa allocation cut-off date" for the recapture program. This date will be used for the purpose of determining the eligibility of class members for adjustment of status.

B. All deportation and expulsion actions against members of plaintiffs' class shall cease in accordance with the Permanent Injunction.

C. The recapture program shall continue until all of the recaptured visa numbers have been allocated or issued.

D. Defendants shall report monthly to the court on the progress of the recapture program, and in particular on:

(1) The monthly and cumulative visa issuances to applicants from the second preference and non-preference categories, and for each allocation stage;

(2) The number of preference subclass members who have been determined to be eligible to participate in any allocation stage of the recapture program, but who have not been allocated visa numbers;

(3) The issuance or notation of Forms I-94 (Arrival-Departure Record) evidencing authorization to remain in the United States pursuant to the Permanent Injunction;

(4) All cases considered by the regional commissioner or assistant regional commissioner pursuant to paragraph 3 of the Permanent Injunction;

(5) Any difficulties encountered in administering the recapture program.

E. This court retains jurisdiction of this action for purposes of modifying the Amended Final Judgment Order as the interests of justice may require.

ENTER:

/s/ Prentice H. Marshall
United States District Judge

DATED: 3/14/80

APPENDIX "F"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 8, 1981

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOHN R. BARTELS, *Senior District Judge**

IMELDA CONTRERAS DE AVILA, et al.,

Plaintiffs-Appellees, and Cross-Appellants,

Nos. 80-1590, 80-1680, and 80-1681 *v.*

BENJAMIN CIVILETTI, et al.,

Defendants-Appellants and Cross-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 1166—Prentice H. Marshall, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Imelda Contreras De Avila, et al., plaintiffs-appellees and cross-appellants, a vote of the active members of the Court was requested, and a majority** of the active members of the Court have voted to deny a rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable John R. Bartels, Senior District Judge of the Eastern District of New York, is sitting by designation.

** Chief Judge Fairchild and Circuit Judges Swygert and Cudahy voted to grant the petition for rehearing.

APPENDIX "G"

PUBLIC LAW 94-571 [H.R. 14535]; Oct. 20, 1976

IMMIGRATION AND NATIONALITY ACT AMENDMENTS OF 1976

An Act to amend the Immigration and Nationality Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Immigration and Nationality Act Amendments of 1976".

SEC. 2. Section 201 of the Immigration and Nationality Act (8 U.S.C. 1151) is amended—

(1) by striking out subsection (a) and inserting in lieu thereof the following:

"SEC. 201. (a) Exclusive of special immigrants defined in section 101(a)(27), and immediate relatives of United States citizens as specified in subsection (b) of this section, (1) the number of aliens born in any foreign state or dependent area located in the Eastern Hemisphere who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, or who may, pursuant to section 203(a)(7), enter conditionally, shall not in any of the first three quarters of any fiscal year exceed a total of 45,000 and shall not in any fiscal year exceed a total of 170,000; and (2) the number of aliens born in any foreign state of the Western Hemisphere or in the Central Zone, or in a dependent area located in the Western Hemisphere, who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, or who may, pursuant to section 203(a)(7), enter conditionally shall not in any of the first three quarters of any fiscal year exceed a total of 32,000 and shall not in any fiscal year exceed a total of 120,000"; and

(2) by striking out subsections (c), (d) and (e).

SEC. 3. Section 202 of the Immigration and Nationality Act (8 U.S.C. 1152) is amended—

(1) by striking out the last proviso in subsection (a);

(2) by striking out subsection (c) and inserting in lieu thereof the following:

"(c) Any immigrant born in a colony or other component or dependent area of a foreign state overseas from the foreign state, other than a special immigrant, as defined in section 101(a)(27), or an immediate relative of a United States citizen, as defined in section 201(b), shall be chargeable for the purpose of the limitations set forth in sections 201(a) and 202(a), to the hemisphere in which such colony or other component or dependent area is located, and to the foreign state, respectively, and the number of immigrant visas available to each such colony or other component or dependant area shall not exceed 600 in any one fiscal year."; and

(3) by inserting at the end thereof the following new subsection:

"(e) Whenever the maximum number of visas or conditional entries have been made available under section 202 to natives of any single foreign state as defined in subsection (b) of this section or any dependent area as defined in subsection (c) of this section in any fiscal year, in the next following fiscal year a number of visas and conditional entries, not to exceed 20,000, in the case of a foreign state or 600 in the case of a dependent area, shall be made available and allocated as follows:

"(1) Visas shall first be made available, in a number not to exceed 20 per centum of the number specified in this subsection, to qualified immigrants who are the unmarried sons or daughters of citizens of the United States.

"(2) Visas shall next be made available, in a number not to exceed 20 per centum of the number specified in this subsection, plus any visas not

required for the classes specified in paragraph (1), to qualified immigrants who are the spouses, unmarried sons, or unmarried daughters of an alien lawfully admitted for permanent residence.

"(3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in this subsection, to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States, and whose services in the professions, sciences, or arts are sought by an employer in the United States.

"(4) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in this subsection, plus any visas not required for the classes specified in paragraphs (1) through (3), to qualified immigrants who are the married sons or the married daughters of citizens of the United States.

"(5) Visas shall next be made available, in a number not to exceed 24 per centum of the number specified in this subsection, plus any visas not required for the classes specified in paragraphs (1) through (4), to qualified immigrants who are the brothers or sisters of citizens of the United States, provided such citizens are at least twenty-one years of age.

"(6) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in this subsection, to qualified immigrants capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

"(7) Conditional entries shall next be made available by the Attorney General, pursuant to such reg-

ulations as he may prescribe, in a number not to exceed 6 per centum of the number specified in this subsection, to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made: or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

"(8) Visas so allocated but not required for the classes specified in paragraphs (1) through (7) shall be made available to other qualified immigrants strictly in the chronological order in which they qualify."

SEC. 4. Section 203 of the Immigration and Nationality Act (8 U.S.C. 1153) is amended—

(1) by striking out "201(a)(ii)" each place it appears in paragraphs (1) through (7) of subsection (a)

and inserting in lieu thereof in each such place "201(a)(1) or (2)":

(2) by striking out the period at the end of paragraph (3) of subsection (a) and inserting in lieu thereof a comma and the following: "and whose services in the professions, sciences, or arts are sought by an employer in the United States.":

(3) by striking out the period at the end of paragraph (5) of subsection (a) and inserting in lieu thereof a comma and the following: "provided such citizens are at least twenty-one years of age."; and

(4) by striking out the second sentence of subsection (e) and inserting in lieu thereof the following: "The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to him of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within two years following notification of the availability of such visa that such failure to apply was due to circumstances beyond his control. Upon such termination the approval of any petition approved pursuant to section 204(b) shall be automatically revoked."

SEC. 5. Section 212(a)(14) of such Act (8 U.S.C. 1182(a)(14)) is amended to read as follows:

"(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8);".

SEC. 6. Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) is amended to read as follows:

"SEC. 245. (a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

"(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or nonpreference visas authorized to be issued under sections 202(e) or 203(a) within the class to which the alien is chargeable for the fiscal year then current.

"(c) The provisions of this section shall not be applicable to (1) an alien crewman; (2) an alien (other than an immediate relative as defined in section 201(b)) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status; or (3) any alien admitted in transit without visa under section 212(d)(4)(C)."

SEC. 7. (a) Section 101(a)(27) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)) is amended by striking out subparagraph (A) and by redesignating subparagraphs (B) through (E) as subparagraphs (A) through (D), respectively.

(b) Section 204 of such Act (8 U.S.C. 1154) is amended to add a new subsection (f), to read as follows:

"(f) The provisions of this section shall be applicable to qualified immigrants specified in paragraphs (1) through (6) of section 202(e).".

(c) Section 211(b) of such Act (8 U.S.C. 1181(b)) is amended by striking out "section 101(a)(27)(B)" and inserting in lieu thereof "section 101(a)(27)(A)".

(d) Section 212(a)(24) of such Act (8 U.S.C. 1182(a)(24)) is amended by striking out "101(a)(27) (A) and (B)" and inserting in lieu thereof "101(a)(27)(A) and aliens born in the Western Hemisphere".

(e) Section 241(a)(10) of such Act (8 U.S.C. 1251(a)(10)) is amended by striking out the language in the parentheses and inserting in lieu thereof the following: "other than an alien described in section 101(a)(27)(A) and aliens born in the Western Hemisphere".

(f) Section 244(d) of such Act (8 U.S.C. 1254(d)) is amended by striking out "is entitled to special immigrant classification under section 101(a)(27)(A), or".

(g) Section 21(e) of the Act of October 3, 1965 (Public Law 89-236; 79 Stat. 921), is repealed.

SEC. 8. The Act entitled "An Act to adjust the status of Cuban refugees to that of lawful permanent residents of the United States, and for other purposes", approved November 2, 1966 (8 U.S.C. 1255, note), is amended by adding at the end thereof the following new section:

"SEC. 5. The approval of an application for adjustment of status to that of lawful permanent resident of the United States pursuant to the provisions of section 1 of this Act shall not require the Secretary of State to reduce the number of visas authorized to be issued in

any class in the case of any alien who is physically present in the United States on or before the effective date of the Immigration and Nationality Act Amendments of 1976."

SEC. 9. (a) The amendments made by this Act shall not operate to affect the entitlement to immigrant status or the order of consideration for issuance of an immigrant visa of an alien entitled to a preference status, under section 203(a) of the Immigration and Nationality Act, as in effect on the day before the effective date of this Act, on the basis of a petition filed with the Attorney General prior to such effective date.

(b) An alien chargeable to the numerical limitation contained in section 21(e) of the Act of October 3, 1965 (79 Stat. 921), who established a priority date at a consular office on the basis of entitlement to immigrant status under statutory or regulatory provisions in existence on the day before the effective date of this Act shall be deemed to be entitled to immigrant status under section 203(a)(8) of the Immigration and Nationality Act and shall be accorded the priority date previously established by him. Nothing in this section shall be construed to preclude the acquisition by such an alien of a preference status under section 203(a) of the Immigration and Nationality Act, as amended by section 4 of this Act. Any petition filed by, or in behalf of, such an alien to accord him a preference status under section 203(a) shall, upon approval, be deemed to have been filed as of the priority date previously established by such alien. The numerical limitation to which such an alien shall be chargeable shall be determined as provided in sections 201 and 202 of the Immigration and Nationality Act, as amended by this Act.

SEC. 10. The foregoing provisions of this Act, including the amendments made by such provisions, shall become effective on the first day of the first month which begins more than sixty days after the date of enactment of this Act.

Approved October 20, 1976.

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IMELDA CONTRERAS DE AVILA, et al.,

Plaintiffs,

No. 78 C 1166 v.

Griffin B. Bell, et al.,

Defendants.

MEMORANDUM DECISION

In this class action for injunctive and declaratory relief, plaintiffs, who are Mexican visa applicants and their United States citizen or permanent resident sponsors, seek the recapture of permanent resident visas incorrectly charged against the Immigration and Nationality Act's per country quota for Mexico. In our memorandum decision of May 18, 1979, we held that the State Deparment had interpreted the 1976 Amendments to the Immigration and Nationality Act incorrectly and that 9,565 additional visas should be awarded to Mexican immigrants. Although we certified a class for liability issues, we held that different groups within the class would have conflicting interests in respect to relief. Therefore we held that the class must be divided into subclasses with separate representation before we could afford any relief. Plaintiffs' motion for certification of these subclasses is now pending.

The 1976 Amendments established a per country quota of 20,000 permanent resident visas per fiscal year. 8 U.S.C. § 1152. The fiscal year begins on October 1, and the effective date of the 1976 Amendments was January 1, 1977. *See* Pub. L. No. 94-571, § 10, 90 Stat. 2707. The State Department charged visas awarded between

October 1, 1976 and January 1, 1977 against the per country quota. This left 5,797 visas available for Mexican immigrants between January 1, 1977 and September 30, 1977, and only 5,435 were actually issued. Garner Deposition at 83, 88-89. We held that the State Department should not have begun charging visas against the per country quota until the effective date of the 1976 Amendments, and that the quota should have been applied pro rata to the three-fourths of fiscal year 1977 remaining after the effective date of the statute. Thus 15,000 visas, or 9,565 additional visas, should have been issued to Mexican immigrants between January 1, 1977 and September 30, 1977.

The 1976 Amendments established a preference scheme for distributing the per country quota, 8 U.S.C. § 1153 (a). Each of the seven preference categories, which are based on familial relationships to United States citizens or permanent residents, professional skills or refugee status, was allocated a percentage of the per country quota. An eighth preference category, the "nonpreference" category, is allocated only the residual visas not used in the seven preference groups. Because the preference system was not in full swing when the State Department incorrectly charged the Mexican visas, our task in ordering distribution of the recaptured visas becomes complicated. Inasmuch as the preference system was not applicable to Western Hemisphere immigrants until January 1, 1977, a considerable time elapsed before the demand for preference category visas equalled the quantity available. The State Department attempted to allocate the quota uniformly from month to month. Therefore, many of the recaptured visas would have gone to immigrants in the nonpreference category if issued in 1977. *See* Garner Declaration. Because of the realities of the distribution as it would have occurred in 1977, we held that the preference applicants and the nonpreference applicants have conflicting interests in the scheme of distribution. These two groups now have separate representation and have proposed two subclasses for certification.

The first subclass consists of

> All current preference immigrant visa applicants who are natives of Mexico, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to preference status on the basis of such familial relationships.

The second proposed subclass contains

> All current non-preference immigrant visa applicants who are natives of Mexico and who, prior to October 1, 1977 established priority dates pursuant to 22 C.F.R. § 42.62 (1968-1977), and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to non-preference status on the basis of such familial relationships.

The defendants argue that proposed subclass 1 should be conditionally certified. All of the named plaintiffs in subclass 1 are second preference aliens, and defendants argue that conflicts of interest may arise among members of the various preference groups which would preclude representation of the class by members of only one preference category. Defendants also challenge the limitation of proposed subclass 2 to aliens with priority dates before October 1, 1977.

Plaintiffs do not contest the elimination of the October 1, 1977 cut-off date in proposed class 2. As for proposed class 1, however, plaintiffs argue that because the number of preference applicants as of October 1, 1977 will not under any circumstances approach the 9,565 total of recaptured visas, the named plaintiffs can adequately represent the subclass, and any conflict of interest would be speculative.

We agree with plaintiffs that the possibility of conflicts of interest arising among the members of subclass 1 is at present speculative. We must order distribution of recaptured visas as they would have been distributed in fiscal 1977. Thus the number of preference applicants

without visas as of October 1, 1977 would determine the upper limit of visas available to preference applicants. This number, however, does not dictate the number of visas that preference applicants will receive, because the government has stated that most of the preference applicants on the list as of October 1, 1977 had established their preference status during the last month of fiscal 1977. Because the State Department issued visas at a uniform rate, the State Department would not have had enough visas remaining in September to satisfy the preference demand arising during that month, even if an additional 9,565 visas had been issued. Therefore all preference applicants now have a coextensive interest in establishing entitlement to the maximum number of preference visas, all of which will be processed as the statutory scheme would have dictated in 1977.

Thus, we have no doubt that the named plaintiffs, all of whom come from one preference category, will adequately represent the subclass. If out confidence in the named plaintiffs proves misplaced, and a conflict of interest arises, we will exercise our authority under Rule 23(c)(1) to alter or amend our certification order. We see no need to make our order conditional, because as plaintiffs note, we have the authority to so alter the certification order regardless of whether we conditionally certify the class. Therefore we certify subclass 1, consisting of

> All current preference immigrant visa applicants who are natives of Mexico, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to preference status on the basis of such familial relationships.

In our memorandum decision of May 18, 1979, we recognized that many of the aliens on the waiting list as of October 1, 1977 have since received visas. Thus any recaptured visas would benefit those aliens who were not on the waiting list as of October 1, 1977 but who would have received a visa by this time absent the

defendants' unlawful charging policy. This displacement effect would be applicable to both preference and non-preference applicants. Thus we see no reason to establish an October 1, 1977 cut-off date for subclass 2, even though as a practical matter only non-preference aliens with priority dates before October 1, 1977 are likely to receive visas. Therefore we certify subclass 2, consisting of

> All current non-preference immigrant visa applicants who are natives of Mexico, and all United States citizens or permanent residents who are relatives of those Mexican visa applicants who established their entitlement to non-preference status on the basis of such familial relationships.

ENTER: /s/ PRENTICE H. MARSHALL
United States District Judge

DATED: September 17, 1979.

APPENDIX "I"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

REFUGIO SILVA, et al.,

Plaintiffs,

No. 76-C-4268 *v.*

EDWARD LEVI, et al.,

Defendants.

IMELDA CONTRERAS DE AVILA, et al.,

Plaintiffs,

No. 78-C-1166 *v.*

GRIFFIN BELL, et al.,

Defendants.

Continued Deposition of CORNELIUS D. SCULLY, III, a witness of lawful age, taken on behalf of the Plaintiffs in the above-mentioned cause, pursuant to adjournment, before Harlyne S. Blum, Notary Public, in the offices of Department of State, 515 Twenty-Second Street, N. W., Room 608, Washington, D. C., commencing at 8 a.m., Saturday, August 5, 1978

Q. Directing your attention to your previous testimony on the Department of State's approach regarding full utilization of quota visa numbers, do you know whether any statute specifically mandates that all visa numbers be used in any fiscal year if the demand for such numbers exists?

A. I do know and the answer is no, it does not.

Q. Is there any other specific legal directive which controls the Department of State's policy concerning efforts to issue all quota visa numbers available for allocation in any one fiscal year?

A. No, there is not.

Q. Do you know the reasons for this policy of maximization of visa numbers, for lack of a better term?

A. Yes, I do. It has always been, since I have been associated with the Visa Office, the view of the Visa Office that the establishment of the numerical limitations on immigration by the Congress had 2 significances:

The statutory expressed (1) that immigration should not exceed the limitations established, but, also, an intent on the part of the Congress that immigration actually be allowed up to those limits if the demand existed for it, and that that imposed on us some obligation to process up to those limits when the demand existed for it.